

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-168

PROCEDURAL HISTORY

On November 20, 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 Tumwater 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 November 20, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on November 21, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On November 21, 2023, OSPI received additional information from the Parent. OSPI reviewed the additional information and determined that the Parent raised an addition allegation.

On November 27, 2023, OSPI acknowledged receipt of the additional allegation, forwarded a copy of it to the District superintendent, and asked the District to respond to that allegation along with the initial allegation.

On December 8, 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 December 16, 2023, the Parent requested an extension of time to respond to the information provided by the District. OSPI granted an extension of time to respond to December 26, 2023.

On December 18, 2023, the OSPI complaint investigator conducted an interview with the Parent.

On December 19, 2023, OSPI received the Parent's reply. OSPI forwarded that reply to the District on December 20, 2023.

On December 20, 2023, the OSPI complaint investigator conducted an interview with the District's executive director of special services.

On January 4, 2024, OSPI received additional documentation from the Parent and shared that document with the District the same day.

OSPI considered all information provided by the Parent and the District as part of its investigation. It also considered the information received and observations made by the complaint investigator during the interviews.

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on November 21, 2022. These references are included to add context to the issues under

investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUES

1. Whether, during the 2023–24 school year, the District followed special education discipline regulations, including holding a manifestation determination meeting if the Student's placement was changed via discipline?
2. Whether, since the end of October 2023, the District has provided the Student's paraeducator support?

LEGAL STANDARDS

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 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).

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

Manifestation Determination: Within ten school days of the district's decision to change the student's placement through discipline, the district, parents and other relevant members of the IEP team (as determined by the parents and the district) must determine whether the behavior

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

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

Functional Behavioral Assessment (FBA): An FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP team in developing a BIP that will reduce or eliminate the misbehavior. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-2). The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP, which includes behavioral intervention services and modifications that are designed to address and attempt to prevent future behavioral violations. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. As with other evaluations, to conduct an FBA, the district must obtain the parents' consent and complete the FBA within thirty-five (35) school days after the district received consent. 34 CFR §300.303; WAC 392-172A-03015. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-4). Once the need for a reevaluation is identified, a district must act "without undue delay and within a reasonable period of time;" and the U.S. Department of Education, Office of Special Education Programs (OSEP) has indicated that waiting several months to seek consent is generally not reasonable. *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008). The IDEA does not specify who is qualified to conduct an FBA, for example there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

Behavioral Intervention Plan (BIP): A BIP is a plan incorporated into a student's IEP if determined necessary by the IEP team for the student to receive FAPE. The BIP, at a minimum, describes: the pattern of behavior(s) that impedes the student's learning or the learning of others; the instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team; the positive behavioral interventions and supports

to reduce the pattern of behavior(s) that impedes the student's learning or the learning of others and increases the desired prosocial behaviors and ensure the consistency of the implementation of the positive behavioral interventions across the student's school-sponsored instruction or activities; and 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.

FINDINGS OF FACT

Background

1. The Student is eligible for special education services based on multiple disabilities, including autism, intellectual disabilities, and health impairments. The Student's most recent evaluation and a functional behavioral assessment (FBA) were completed on March 24, 2022.
2. During the 2022–23 school year, the Student was served in a self-contained special education program at a nonpublic agency (NPA). The Student had a behavioral intervention plan (BIP), the most recent of which was developed during a meeting on January 20, 2023. Due to the impending potential closure of the NPA, on May 26, 2023, a new individualized education program (IEP) was developed for the Student to be implemented, effective June 23, 2023, in a District program located in a District elementary school. The IEP indicated that behavior is an area of need and referenced a BIP.
3. The Student's May 26, 2023 IEP included annual goals in the following topic areas: social/emotional, adaptive, behavior, cognitive, communication, and fine motor with quarterly progress reporting. It also included ten accommodations. The Student's IEP did not include time in a general education setting and provided the Student with all 1,725 minutes per week of instruction via the following specially designed instruction in a special education setting:
 - Occupational Therapy: 20 minutes a week to be provided by an occupational therapist (OT)/certified OT assistant (COTA)
 - Communication: 25 minutes a week to be provided by a speech-language pathologist (SLP)
 - Behavior: 410 minutes a week to be provided by special education staff
 - Adaptive: 400 minutes a week to be provided by special education staff
 - Cognitive: 455 minutes a week to be provided by special education staff
 - Social/Emotional: 415 minutes a week to be provided by special education staff

2023–24 School Year

4. The District's 2023–24 school year began on September 6, 2023. The Student was in the fourth grade and was placed in a program at a District elementary school.
5. At the start of the 2023–24 school year, the Student's May 2023 IEP was in effect. The Student's IEP was implemented in an academics/behavior classroom, a special education classroom setting that began the year with three students.

The staffing for the classroom at the beginning of the year was six adults to three students. The adults included a special education teacher who is also a board-certified behavior analyst

(BCBA), a classroom paraeducator, and four staff required per other students' IEPs (three registered behavior technicians (RBTs) and one one-to-one paraeducator.)

6. The Parent alleged that the Student was sent home from school for behavioral concerns that were related to his disabilities on 14 days in the 2023–24 school year. Specifically, the Parent alleged that school staff told the Parent to pick the Student up and/or keep the Student home from school on September 14, 20, 22, 27, and 29, and October 2, 3, 4, 5, 13, 16, 17, 18 and 19, 2023. The Parent said the events have been recorded by the District as suspensions, classroom exclusions, "mental health days," "early departures," and absences and tardies.
7. District records indicate two instances of discipline on October 3 and October 17, 2023, issued for three days each, a total of six days of out-of-school suspension: October 3, 4, 5, 17, 18, and 19, 2023. Correspondence included notification of the Parent via a letter in both instances of short-term discipline and the letter outlined the specific reasons for the discipline. The District's position is that these two short-term suspensions did not constitute a placement change via disciplinary action, as the Student was returned to the school and program immediately after.
8. The Student's attendance records indicated several other dates when the Student was marked absent, left early, or arrived late. The District also acknowledged that District information and records are unclear about why the Student was absent or left early, and whether they resulted from verbal discussions between the District (teacher or principal) and the Parent. But the District noted, "Data related to restraints and isolations indicate a significant pattern of aggressive behavior, which would support the need for a manifestation determination process for the Student," and provided the data to support this information. Because of this, the District said it "would offer a manifestation determination meeting with the Parent to review the existing data for team determination of a need for further FBA/BIP review." And the District stated, "In the interest of continuing to support the Student's learning, the [D]istrict would offer a compensatory education program of 10 hours total as arranged at mutually agreed upon time for potentially missed learning opportunities on the various dates of discipline and/or early departures of the Student."
9. The Student's attendance records indicated a full day of excused absences on Thursday, September 28, 2023, due to "Class Exclusion."¹ It also indicated a full day of absence on Monday, October 2, 2023, due to "Illness," which is a date the Parent asserted the Student was kept home at the request of school staff. As discussed below, the prior Friday, September 29, 2023, the Student had an early departure from school.
10. The school hours at the school where the program is located were Monday to Thursday from 8:45 am to 3:15 pm and Fridays from 8:45 am to 2:00 pm. The Student's attendance records indicate that, between the start of school and October 25, 2023, the Student had six partial

¹ The Student was also absent two full school days on October 2 and 20, 2023, and those absences are listed as "Illness" and medical appointment. The Parent did not assert that these absences were at the request of school staff.

day excused absences that resulted in 836 minutes of missed school time. Three are listed as "Mental Health," two are listed as "Early departure," and one that was not coded but had a comment that referred to low staffing numbers:²

- September 14, 2023: Mental Health, "Comment: out at 12:32" (163 minutes early)
- September 20, 2023: Early Departure, "Comment: out at 3:00," (15 minutes early)
- September 22, 2023: Mental Health, "Comment: out at 11:54," (126 minutes early)
- September 27, 2023: Mental Health, "Comment: out at 12:00," (195 minutes early)
- September 29, 2023, Early Departure, "Comment: out at 1:30," (30 minutes early)
- October 16, 2023: "Comment: out at 10:08 low staffing" (307 minutes early)

11. On October 23, 2023, the Student's IEP team developed a new annual IEP for the Student that added the support of a one-on-one RBT to his IEP. The IEP did not change the Student's existing annual goals, or the amount of specially designed instruction. The only change to the IEP was to add the RBT as a one-on-one for 1,725 minutes per week as a supplementary aid and service to be provided in the special education setting.
12. The Student's RBT began working one-on-one with him on October 25, 2023. The Parent raised a concern about the Student's one-on-one RBT's absences. The Parent said that the Student's teacher indicated that he or others will assist the Student, but asserted that the Student has not "had his own."
13. The District denied that it failed to provide the Student with the one-on-one RBT as required by his IEP. The District's executive director of special education explained to OSPI that, prior to October 25, 2023, due to the classroom's high adult-to-student staffing ratio, the classroom paraeducator was transferred out of the classroom. Thus, as of October 25, 2023, there were six adult staff in the classroom to three students: the classroom teacher, a one-on-one RBT for the Student, a one-on-one RBT for another student, and two one-on-one RBTs and a paraeducator assigned to a third student. As described below, the District provided staff to serve as teachers and RBTs.
14. On November 2–22, 2023, the Student's usual RBT was on leave. According to the District and the evidence it provided, during that time, the Student's classroom had a teacher and four RBTs for the Student and the other two students at all times, except for on November 2 and 3, 2023.³ Because the District was unable to secure a substitute through its usual system, the District utilized a BCBA who oversees the RBTs on November 6, 7, 8, 9, and 13, 2023, to ensure full staffing in the Student's program. The District then pulled three different RBTs from other District programs on the following days to ensure that the Student and the other two students in the programs had RBTs on November 14, 15, 16, 17, 20, 21, and 22, 2023. The Student's usual RBT returned on November 27, 2023, and has been present daily since that date.

² The Student's attendance records also indicated that between the start of school and October 25, 2023, the Student had four partial day excused absences or early departures/late arrivals that were listed as medical appointments. The Parent did not assert that the Student's absences on any of these dates (September 8 and 19, and October 12 and 25, 2023) were at the request of school staff.

³ The classroom also has a paraeducator for another student in the classroom.

15. Between October 25 and November 28, 2023, the Student did not have any full or partial absences recorded for mental health, early departure, or any reasons other than medical appointments.⁴

CONCLUSIONS

Issue One: Disciplinary Procedures – The Parent alleged that the District failed to follow disciplinary procedures when the Student was sent home from school for behavioral concerns that were related to his disabilities for 14 days in the 2023–24 school year. Specifically, the Parent alleged that school staff told the Parent to pick the Student up and/or keep the Student home from school on September 14, 20, 22, 27, and 29, and October 2, 3, 4, 5, 13, 16, 17, 18 and 19, 2023. A district is required to count the number of classroom exclusions to determine if there was a disciplinary change of placement resulting from a consecutive disciplinary removal or a pattern of disciplinary removals. A district is also required to ensure that special education services are provided in conformity with the IEP.

Here, the Student had a one-day classroom exclusion on September 28, 2023. There is another full day where the evidence is unclear as to whether the Student was ill or was kept home on October 2, 2023, at the request of District staff. And, the Student was issued suspensions on October 3, 4, 5, 17, 18, and 19, 2023, for a total of six days out of school. Additionally, the Student's attendance records indicated that there were at least six school days where the Student missed part of the school day for reasons that were listed as "Mental Health," "Early departure," and "low staffing numbers: September 14, 20, 22, 27, 29, and October 16, 2023. Those six partial days resulted in a loss of 836 minutes of school time or approximately 14 hours, and the Student's school day is usually six and a half hours. Due to the loss of notes and records and staffing changes, the District could not provide evidence that school staff did not request these partial day absences—i.e., ask the Parent to pick the Student up early.

OSPI finds that the Student was suspended six days. He also had a classroom room exclusion one day. And, although the absence was coded as "illness," he may have been kept home another full day at request of staff. Additionally, there are six partial days between September 14 and October 19, 2023, when the Student may have been excluded at the request of District staff.

The District acknowledged that District information and records are unclear about why the Student was absent or left early. A violation is found for the District failing to document discipline referrals that amounted to classroom exclusions. As corrective action, the District is required to provide written guidance regarding disciplinary procedures and classroom exclusion to all school staff, including all administrative staff and administrative support staff.

A change in placement occurs when a student is removed from his or her current placement because of discipline for more than ten consecutive days, or when the student is subjected to a series of removals that constitute a pattern because the removals total more than ten school days

⁴ There were three medical appointments listed on November 3, 16, and 21, 2023, but the Parent did not assert the Student missed school or left early/arrived late based on a request by school staff on these dates.

in a school year. OSPI finds a violation because there was a series of removals between September 14 and October 19, 2023, constituting a pattern, and in all, the Student likely missed at least ten school days or slightly more.

However, OSPI finds that the issue of a change in placement was addressed, in part, by the District when, on October 23, 2023, an IEP meeting was held and a one-on-one RBT was added for the Student. Since that date, the Student has not been disciplined, nor did the Parent assert that District staff requested the Student stay home or leave early/arrive late since that date. The District also offered to hold a manifestation determination meeting with the Parent to review the existing data for team determination of a need for further FBA/BIP review and offered 10 hours of compensatory education for potentially missed learning opportunities on the various dates of discipline and/or early departures of the Student. OSPI finds that this is an appropriate remedy for the pattern of exclusion.

Issue Two: Paraeducator Support – The Parent alleged that the Student has not received the one-on-one aide support required by his October 2023 IEP since the end of October.

A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. However, 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 Student's IEP was revised on October 23, 2023, and the District provided evidence to establish that, since October 25, 2023, the District has provided the Student's one-on-one RBT except on two dates, November 2 and 3, 2023, when they could not find qualified staff or a substitute. According to the Student's attendance record, he had a medical appointment on November 3, 2023, and was absent all or part of that day.

OSPI finds that there was no material failure to implement the Student's IEP when there was no one-on-one RBT aide on October 24, 2023, the day after the IEP was changed, or on November 2, 2023, when no substitute or qualified staff were available to serve as a one-on-one RBT, because nonetheless, there was a classroom teacher, three other RBTs, and a paraeducator in the Student's classroom that were able to assist in meeting the Student's needs. OSPI finds no violation.

CORRECTIVE ACTIONS

By or before **January 29, 2024, March 11, 2024, and June 28, 2024**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP/Manifestation Determination Meeting

By or before **January 22, 2024**, the Student's IEP team will meet. At the meeting, the IEP team must address the following topics:

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

By **January 29, 2024**, the District will provide OSPI with: i) a prior written notice, summarizing the group's discussion and decisions concerning the above matters; ii) a copy of the Student's IEP; iii) any relevant meeting invitations and prior written notices; and iv) any other relevant documentation.

Compensatory Education

By **January 22, 2024**, the District and the Parent will develop a schedule for 10 hours of compensatory education in the areas of social/emotional/behavior, adaptive, behavior, cognitive, communication, and fine motor.

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher. Services will be provided in a 1:1 setting and be in-person. The services must be provided outside of the school day and may be provided on the weekends or during District breaks. The District will provide OSPI with documentation of the schedule for services by or before **January 29, 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 **June 21, 2024**.

By or before **June 28, 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 **June 28, 2024**.

DISTRICT SPECIFIC:

Written Guidance

By **February 16, 2024**, the District will ensure that the following individuals receive written guidance on the topics listed below: school administrators, special education certificated staff (teachers), and general education teachers, at the school that the Student was enrolled in during the 2023–24 school year. The guidance will include examples and discussion of best practices regarding:

- Disciplinary procedures and classroom exclusions. WAC 392-172A-05155.
- Addressing behavior needs. WAC 392-172A-03110.

- District policies and procedures for recording and tracking disciplinary exclusions.

By **January 29, 2024**, the District will submit a draft of the written guidance to OSPI for review. OSPI will approve the guidance or provide comments by February 9, 2023.

By **March 11, 2024**, the District will submit documentation that all required staff received the guidance. This will include a roster of the required personnel. This roster will allow OSPI to verify that all required staff members received the guidance.

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 4th day of January, 2024

Dr. Tania May
Assistant Superintendent of Special Education
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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.)