

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-187

PROCEDURAL HISTORY

On December 19, 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 East Valley 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 December 19, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent. OSPI asked the District to respond to the allegations made in the complaint.

On January 5, 2024, OSPI received the District's response to the complaint and forwarded it to the Parent on January 8, 2024. OSPI invited the Parent to reply.

On January 19, 2024, OSPI received the Parent's reply. OSPI forwarded that reply to the District on January 22, 2024.

On February 7, 2024, OSPI requested that the District provide additional information, and on February 9, 2024, OSPI interviewed the District's director of special education.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on December 20, 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, since December 20, 2022, the District followed referral, initial evaluation, and initial IEP development timelines?
2. Whether the District made an appropriate eligibility determination for the Student in spring 2023 per WAC 392-172A-01035?
3. Whether the District addressed the Parent's request for and the Student's need for a functional behavioral assessment (FBA) and behavioral intervention plan (BIP)?
4. Whether the District followed special education discipline regulations when the Student was expelled WAC 392-172A-05140 through WAC 392-172A -05155?
5. Whether the District responded to the Parent's request for educational records per WAC 392-172A-05190?

6. Whether the Student was denied a free appropriate public education (FAPE) due to bullying?

LEGAL STANDARDS

Referral: Any person who is knowledgeable about the student may make a referral of a student suspected of having a disability. 34 CFR §300.301; WAC 392-172A-03005(1). A referral may be implied when a parent informs a school that a child may have special needs. *In the Matter of the Lake Washington School District*, 57 IDELR 27, OSPI Cause No. 2011-SE-0020X (WA SEA 2011). When a student suspected of having a disability is brought to the attention of school personnel, the district must document that referral. It must provide the parents with written notice that the student has been referred because of a suspected disabling condition and that the district, with parental input, will determine whether there is sufficient data to suspect a disability. It must review the referral, and it must collect and examine existing school, medical, and other records. The district must determine within twenty-five (25) school days after receipt of the referral whether it will evaluate the student. 34 CFR §300.301; WAC 392-172A-03005.

Initial Evaluation – Specific Requirements: The purpose of an initial evaluation is to determine whether a student is eligible for special education. 34 CFR §300.301; WAC 392-172A-03005(1). When the student is to be evaluated to determine eligibility for special education services the district shall fully evaluate the student and arrive at a decision regarding eligibility within thirty-five (35) school days after the date written consent for an evaluation has been provided to the school district by the parent. WAC 392-172A-03005.

A group that includes qualified professionals selected by the district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, in order to determine if the student is eligible for special education and the content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum. A school district must assess a student in all areas related to his or her suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor ability. The evaluation must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not they are commonly linked to the disability category in which the student has been classified. No single measure or assessment as the sole criterion is used for determining a student's eligibility or determining an appropriate educational program for the student. 34 CFR §300.304; WAC 392-172A-03020.

Initial IEP: For an initial IEP, a school district must ensure that: a) the school district holds a meeting to develop the student's IEP within thirty (30) calendar days of a determination that the student is eligible for special education and related services. 34 CFR §300.323; WAC 392-172A-03105.

Consent for Initial Provision of Services: A school district that is responsible for making FAPE available to a student must obtain informed consent from the parent of the student before the initial provision of special education and related services to the student. The school district must make reasonable efforts to obtain informed consent from the parent for the initial provision of

special education and related services to the student. If the parent of the student refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the school district: Will not be considered to be in violation of the requirement to make available FAPE to the student for the failure to provide the student with the special education and related services for which the school district requests consent; and is not required to convene an IEP team meeting or develop an IEP. 34 CFR §300.300; WAC 392-172A-03000.

Eligibility Under IDEA: A student eligible for special education means a student who has been evaluated and determined to need special education because he or she has a disability in one of the eligibility categories listed in regulation and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations. 34 CFR §300.8(a)(1); WAC 392-172A-01035(1)(a). A student's eligibility category does not determine services. *In the Matter of Issaquah School District*, 103 LRP 27273, OSPI Cause No. 2002-SE-0030 (WA SEA 2002) (see also WAC 392-172A-03020)(g): "In evaluating each student to determine eligibility or continued eligibility for special education service, the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified."

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 behavioral intervention plan (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).

Disciplinary Removals – No Change of Placement: School districts may remove a student eligible for special education who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days to the extent those alternatives are applied to students without disabilities and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement under WAC 392-172A-05155. 34 CFR §300.530(b)(1); WAC 392-172A-05145(2). A school district is only required to provide services during periods of removal to a student eligible for special education who has been removed from his or her current placement for ten school days or fewer in that school year, if it provides services to a student without disabilities who is similarly removed. 34 CFR §300.530(d)(3); WAC 392-172A-05145(2).

Parents' Access Rights to Student Records: Districts must permit the parents of a student eligible for special education to inspect and review, during school business hours, any educational records relating to the student that are collected, maintained, or used by the district. The district must

comply with a request promptly and before any meeting regarding an IEP or provision of a free appropriate public education (FAPE) to the student. The district must respond in no more than 45 calendar days after the request has been made. The right to inspect and review educational records includes: the right to a response from the district to a reasonable request for explanations and interpretations of the records; the right to request that the district provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising their right to inspect and review the records; and the right to have a representative of the parent or adult student inspect and review records. 34 CFR §300.613; WAC 392-172A-05190.

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. 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, (OSERS/OSEP Aug. 20, 2013).

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 (9th 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*, 61 IDELR 263, (OSERS/OSEP Aug. 20, 2013).

FINDINGS OF FACT

Background and 2022–23 School Year

1. At the start of the 2022–23 school year, the Student attended a District K–8 school and was not eligible for special education services. The Student had a 504 plan.
2. The District's 2022–23 school year began on August 16, 2022.
3. On November 29, 2022, the Parent emailed the school counselor to share a private evaluation of the Student. The Parent stated, "at some point, after the new year, we'll need to sit down and discuss how this new information affects [Student's] learning and the accommodations that will be necessary to maximize her learning." The email subject line was "[Student] 504/IEP."

The private psychological evaluation report documented that the evaluation included interviews with the Student and Parent, observations, a review of medical and school records, a Student questionnaire, and several assessments.¹ The report documented diagnoses of autism spectrum disorder, level one, unspecified anxiety disorder, and major depressive disorder. The evaluation report included recommendations for occupational therapy, mental health therapy, and behavioral interventions and management strategies.

4. On December 2, 2022, the school counselor responded with dates in January and dates during March 2023 parent-teacher conferences. The Parent responded that they would be out of town until January 21, 2022, and suggested they meet in March.
5. The Parent noted in her reply to the District's response that she was not, at this point, given other meeting date options and that the counselor did not suggest an IEP or provide information about the IEP process.
6. The District shared that the school counselor had previously worked with the Parent and Student on the Student's 504 plan and that the prior conversations they had were centered around the 504. The school counselor thus interpreted the Parent's November 2022 email to be about the 504 and that the first clear indication the Parent was seeking special education services was in January 2023.

Complaint Investigation Timeline Began December 20, 2022

7. The District was on winter break from December 19, 2022 through January 2, 2023.
8. On January 27, 2023, the Parent emailed and asked, "could we get the ball rolling for the IEP for [Student]," and the school counselor responded that he would contact the school psychologist with the Parent's request.
9. On February 1, 2023, the school psychologist contacted the Parent to explain the special education process and mailed the Parent a hardcopy of the paperwork. The school psychologist's email documenting this stated the Parent wanted to make a referral for special education evaluation and "since the request has to be in writing I am mailing her the Parent Referral...form."
10. The District was on midwinter break from February 13 through 24, 2023.
11. On March 28, 2023, the Parent stated the Student brought the paperwork to the school office. According to a later email from the Parent, the "dropped the paperwork on March 28th and handed it to the woman at [the] front desk...It was delivered to the school and given to a school representative."

¹ Assessments included, among others: Autism Diagnostic Observations Schedule-2 (ADOS-2) and Weschsler Intelligence Scale for Children-Fifth Edition.

The Parent emphasized in her reply that on March 28, 2023, the Parent “watched [the Student] take the envelope through the front door, and confirmed a couple of hours later, that she had dropped the envelope off at the front desk.” The Parent stated, “Once the envelope is put into the hands of responsible school personnel, it is the school’s responsibility to get it to the appropriate individual not mine. We do not have access to teacher/administrator’s mailboxes.”

12. The District was on spring break from April 3–7, 2023.
13. On April 11, 2023, the school psychologist received the Parent’s referral paperwork in her staff mailbox. The school psychologist stated she worked at multiple schools and was at the Student’s school on Tuesdays and Fridays; however, March 27–31, 2023 was conference week and her schedule was atypical. The school psychologist stated she checked her mailbox on March 31, 2023, and it was empty, and then checked her mailbox again on April 11, 2023, after spring break.
14. The District’s response contained a document titled “Parent Referral for Special Education Evaluation,” filled out by the Parent with information about the Student’s suspected disability, concerns, and needed supports. The document had a handwritten notation that stated “[received] 4/11/23.”

The Parent referral form included the Student’s diagnoses, information about the impact and support the Parent thought was needed.

15. An April 11, 2023 prior written notice stated the “Evaluation team is proposing to initiate a referral for special education evaluation for [Student].” The notice also provided that a decision regarding whether to evaluate would be made within 25 school days.
16. On April 13, 2023, a behavioral incident led to the Student being issued an emergency expulsion. The District explained that an investigation and threat assessment was conducted. An appeal hearing was also held, and the discipline was converted to a five-day, out-of-school suspension (April 14 to 21, 2023).

According to a later, May 15, 2023 email from the Parent, the Student missed 10 days of school due to the emergency expulsion and the Parent expressed concern the Student was not provided homework or “help with...homework” during this period. Subsequent emails with the principal indicated the principal had discussed with the Student’s teachers about missing work, how the Student could complete that work, and which assignments the Student could complete to show comprehension.

17. The Student’s attendance record indicates that on April 14, 17, 18, 19, and 20, 2023, the Student was absent due to “out of school suspension.” On April 21 and 24, 26, 27, and 28, 2023, the Student had excused absences with the reason given as “Parent called” and “Slept Late.” The Student was marked “tardy” on April 15, 2023.

18. The special education director stated that the Student was welcome back at school following the suspension on April 21, 2023, and that this had been made clear to the Parent and Student at the discipline appeal. The director stated that while the original discipline paperwork stated 10 days, the discipline was converted to a five-day suspension.
19. On April 21, 2023, the District's guidance team met to consider the Student's referral. An April 21, 2023 prior written notice documented that the District proposed to initiate a special education evaluation of the Student.
20. On April 25, 2023, the principal and a teacher emailed regarding how the teacher should communicate regarding "issues with peers" and the Student. The teacher asked if she should use a "bullying form." The principal responded that the teacher could let him, or the school counselor know if the Student was "having a particular struggle with an issue or a person so we could address it right away."²
21. On May 1, 2023, the Parent signed consent for a special education evaluation, which was received by the District on May 2, 2023. The consent form checked the following to be evaluated: adaptive, social, general education, fine motor, observation, and behavior.
22. On May 26, 2023, the evaluation group met to review the evaluation of the Student. The evaluation group found the Student eligible for special education services under the category emotional behavioral disability and included the emotional behavioral disability criteria. The evaluation report included the following explanation of the impacts of the Student's disability:
The identified educational disability affects [Student's] involvement and progress in age-appropriate activities and environments. She is often tired and misses school due to doctor appointments, or is late because she wants to avoid a class. She has significant struggles with social interaction with others. She does not respond to conflict effectively, sometimes lashing out emotionally. These affect her ability to access lessons and classwork, effectively participate in school, and have positive relationships...

The evaluation report included recommendations that the Student receive specially designed instruction in adaptive/self-help skills and social skills.

The evaluation report included medical information, including that the Student had a diagnosis of "autism spectrum disorder – level 1", "unspecified anxiety disorder", and "major depressive disorder." The evaluation report also documented input from the Student's general education teachers, results from the "SSIS Social-Emotional Learning (SEL) Edition" – teacher rating scales; information from the private November 2022 psychological evaluation, which included the "Behavior Assessment system for Children – 3" (BASC-3) – Parent, teacher, and self-report forms and addressed behavior and adaptive needs, upon which the Student fell within the at-risk or clinically significant categories; assessments in fine motor; and information from observations.

² The District's response contained documentation—timeline and emails—regarding other concerns about bullying the Parent and Student raised between May 3, 2016 and September 22, 2022.

23. In the District's response, the school psychologist explained that during the evaluation, they reviewed the private evaluation and that the "eligibility category of Emotional/Behavioral Disability was determined to best reflect [Student's] educational needs." The psychologist stated that "as a practicing school psychologist for 30 years with examination of all available information and positive intent I opine [Student's] mental health/emotional disability to adversely impact her education in four of the five listed areas [in the definition of emotional behavioral disability] and that "mild autism traits were established via independent evaluation, however in my opinion are not the sole reason for [Student's] struggles."
24. The District response also included that an FBA was not included in the initial evaluation because upon receipt of the referral, "a review of discipline information to date did not indicate a pattern of behavior that would warrant an FBA/[behavior intervention plan] BIP."
25. The Parent's complaint included a June 5, 2023 "dispute letter," documenting the Parent's disagreement with the evaluation. The Parent stated that during the evaluation meeting, she asked if she could bring the "packet of papers" that were reviewed during the meeting home for further review and was told she could not. The Parent stated that she did not agree with the "terms of the IEP" and that "there were tests and screenings...cited in the evaluation" that she "did not receive copies of...to review [herself]." The Parent requested copies of the following:
- Vision and hearing screening
 - Results of the social evaluations, adaptive/self-help evaluations, and behavior evaluations
 - Results of the "Pearson's test"

Regarding the evaluation report, the Parent listed points she disagreed with, including, in part:

- That behaviors were not identified as "symptoms of autism."
- That no related services or supplementary aids and services were recommended.
- That she felt the evaluation was not "full and individual," in part because the psychologist did not meet with or interview the Student.
- That "almost all of your conclusion come from the BASC-3."
- That the evaluation report did not contain information from other medical evaluations and other diagnoses, information about private assessments conducted, or information about medications.
- That the evaluation report did not adequately address the Student's behavior and discipline.
- That the Student was assessed in fine motor but not attention to task and sensory processing.
- No "ADOS (Autism Diagnostic Observations Schedule)" was included.

The Parent stated she wanted an FBA and a BIP.

26. In her reply to the District's response, the Parent stated that she did not receive any of the records she requested in her June 5, 2023 letter. The Parent also stated she requested these records again on June 22, 2023 in an email.
27. In its response, the District stated that "it was shared that [the Parent] could review the protocols and information" and that it "does not appear anything was scheduled to review in person."

The director shared that ultimately, they held several meetings to review and discuss the evaluation, given the Parent's disagreement, between the end of May and into June 2023. The meetings were attended by at least one school psychologist, the principal, the special education teacher, the Parent, and the Student. The director stated she attended a couple of the meetings, but not all. The director stated that it was communicated at these meetings that they could schedule a time for the Parent to review the records she requested and that they could go over all the protocols and records and explain the documents. The director stated the Parent did not schedule a time to review records.

28. On June 20, 2023, the District sent home a draft copy of the IEP in advance of the IEP meeting.
29. A June 22, 2023 email from the Parent indicated, in part, that she disagreed with the eligibility category and believed that the evaluation failed to consider the Student's autism diagnosis. The Parent also indicated she believed the Student needed a BIP.
30. On June 23, 2023, the Student's IEP team met and developed the Student's initial IEP. The IEP indicated the Student's "behaviors of not turning in classwork are impeding her learning. Her...[autism] is interfering with her learning," but that, at that time, the Student was not "displaying behaviors that impede the learning of others." The IEP included annual goals in adaptive/self-help (to do list, sensory), social (social management), with progress reporting at the semester. The IEP included several accommodations and modifications. And the IEP provided the Student with the following specially designed instruction in June 2023 in a *general education setting*:
 - Adaptive/self-help skills: 30 minutes, four times a week (to be provided by a general education teacher)
 - Social skills: 30 minutes, four times a week (to be provided by a general education teacher)

The IEP provided the Student with the following specially designed instruction from July 2023 through June 2024, in a *special education setting*:

- Adaptive/self-help skills: 25 minutes, five times a week (to be provided by special education teacher)
- Social skills: 30 minutes, five times a week (to be provided by a special education teacher)

The IEP included several accommodations, including extra time, accommodations related to assignments, preferential seating, extra transition time, breaks as needed to visit the "clinic/counseling center", and "When absence due to reason [associated] with her [autism], allow [Student] to prioritize assignments."

31. Also, on June 23, 2023, the Parent signed a consent form for a reevaluation of the Student. The areas listed on the form were: review of existing data, social/behavior, general education, adaptive, behavior, medical-physical, and "other: Sensory Profile & FBA"; and the form noted the reevaluation was requested by the Parent to "address objections to previous evaluation & [additional] concerns."
32. A June 29, 2023 prior written notice indicated the District proposed to implement the Student's IEP, although noted the Parent "objected to the evaluation's identified Disability

Category.” The notice stated the District was still proposing implementing the IEP but noted that while “the Parent is not in agreement with elements of the most recent evaluation”, that the Parent “consented to development of an IEP in areas of agreement while re-evaluation is conducted to address concerns. This IEP will be updated to align with any updated recommendations as a result of that separate evaluative process. The IEP will be implemented upon receipt of the initial consent for placement.”

33. On June 30, 2023, the Parent emailed the District proposed changes to the IEP. A June 30, 2023 prior written notice indicated the team sent the Parent a draft copy of the IEP to review before the Parent gave initial consent for services.
34. The District’s school year ended on June 30, 2023.
35. During the 2022–23 school year, the Student had 46.5 days of excused absences (for a variety of reasons, including medical appointments, illness, mental health, and other reasons), 3.5 days of unexcused absences, and 76 periods tardy.

Summer 2023

36. A July 6, 2023 prior written notice indicated the “Parent asked to review the DRAFT IEP with requested changes” and that the Parent was sent a second copy of the draft IEP on July 6, 2023, with requested changes made (emphasis in original). The notice did not specify what the changes were.
37. On August 21, 2023, the Parent signed consent for the Student to “receive initial special education services.” The Parent wrote on the consent form:

In an effort to give [Student] a functioning IEP in time for her freshman year, I am signing this IEP, but I am contesting the outcome of her IEP determination being based on a behavioral issue as her disability and need for an IEP is directly due to her being on the autism spectrum disorder, and I would like a FBA performed and behavioral plan implemented.

2023–24 School Year

38. At the start of the 2023–24 school year, the Student was eligible for special education services under the category of emotional behavioral disability, attended a District high school, and her June 2023 IEP was in effect.
39. The District’s 2023–24 school year began on August 29, 2023.
40. On September 7 and 8, 2023, the Parent and high school school psychologist emailed regarding the reevaluation and the Parent shared some of her concerns, including the need to identify the Student’s eligibility category as autism and the need for an FBA and BIP.
41. A September 12, 2023 prior written notice indicated the team proposed to initiate an FBA. The team planned to complete the FBA and meet on October 13, 2023.

42. On October 9 and 12, 2023, the District reported the Student's progress as "emerging skill" for her adaptive/self-help (to do list and sensory) and social skills (social management) goals.
43. On October 13, 2023, the Student's evaluation group met to discuss the reevaluation of the Student. The reevaluation indicated the Student continued to be eligible for special education services, now under the autism category, and recommended specially designed instruction in adaptive and social skills.

The reevaluation contained information about the Student's health and developmental history, contain information from private evaluations, a review of existing data, input from current teachers, and included new assessment information from the "Behavior Assessment System for Children, Third Edition (BASC-3)." The reevaluation reports also included sections on cognitive, communication, fine motor, and age-appropriate transition assessments.

The prior written notice, documenting the reevaluation, indicated the District proposed to "change the eligibility category...to Autism" and that no changes were proposed to the Student's areas of specially designed instruction.

44. Also, on October 13, 2023, the Student's IEP team updated her IEP and developed a BIP.

The IEP included updated present levels annual goals in adaptive/self-help (prioritizing and to do list and communication and self-efficacy) and social (social management/sensory strategies and sensory stress de-escalation strategies), with progress reporting at the semester. The IEP included several accommodations and modifications. The IEP provided the Student with the following specially designed instruction:

- Adaptive/self-help skills: 25 minutes, five times a week (to be provided by a special education teacher in a special education setting)
- Adaptive/self-help skills: 30 minutes, four times a week (to be provided by a general education teacher in a general education setting)
- Social skills: 30 minutes, four times a week (to be provided by a general education teacher in a general education setting)
- Social skills: 30 minutes, five times a week (to be provided by a special education teacher)

The IEP indicated the Student would spend about 84% of her time in a general education setting and would receive her specially designed instruction in an academic support class.

The BIP included information on the Student's strengths, a summary of data collected, information about factors that contribute to the Student's behaviors, target behaviors—"effectively communication frustrations after an injustice"—and intervention strategies. The BIP was based on an FBA that was completed and reviewed on October 13, 2023, as well.

The prior written notice, documenting the BIP development, noted that previously the Student "has become so frustrated that she has engaged in behaviors that resulted in discipline" and that the team was "initiating a plan to be proactive in addressing her needs and providing support in order to avoid future circumstances."

45. On October 13, 2023, following the meeting, the psychologist emailed the Parent an updated copy of the FBA and BIP based on the discussion in the meeting and stated she would send a copy of the evaluation on October 16, 2023.
46. On October 19, 2023, the special education teacher emailed the Parent and noted she updated the goals in the Student's IEP, specifically updating the starting percentage of some of the goals. The Parent responded that "everything looks good to me."
47. On December 19, 2023, the Parent filed this complaint, which included several allegations summarized as follows:
- Not addressing the Student being bullied;
 - Not providing the Student with an IEP and following referral and evaluation procedures;
 - Not addressing the Student's behavior needs, including providing an FBA or BIP;
 - Expelling the Student without addressing special education needs;
 - Not sufficiently evaluating the Student and addressing her Autism; and,
 - Not addressing records requests.

The Parent stated that all of this impacted the Student's mental health, ability to attend school, and school success and grades.

48. Regarding bullying, in her reply to the District's response, the Parent stated that she did not know what a harassment intimidation bullying (HIB) complaint was, nor had she ever been told about a formal process or procedure she should be using, despite sharing concerns via email about "problems [Student] has had with her classmates." The Parent stated there was documentation "over the years" that the Student has been bullied and cited information from 2021 and 2022. The Parent also stated:

Attendance and report cards are a RESULT of bullying, sensory issues, and problems within the school district and teachers. This is evidenced by the grades continuing to slide over the years, and her attendance dropping as she gets older. Tardies are because of her school teacher she said was bullying her. This became increasingly prevalent during 8th grade when [Student] was placed in one of [teacher's] elective classes in 8th grade after we specifically told the 504 team that she had trouble with [teacher]...treating her like an active threat after her expulsion even though her dominant arm was broken and she needed accommodations to lift a pencil during class time...or do more than walk in P.E., insisting she have her backpack searched upon entering school...She again was being bullied by the school system by the inaction when, on May 15th, I contacted [director] and mentioned that [Student] was failing three classes because her teachers refused to help her or modify the requirement of her assignment (still has no IEP)...

(Emphasis in original.)

CONCLUSIONS

Issue One: Referral, Initial Evaluation, and Initial IEP Timelines – The Parent alleged she referred the Student for a special education evaluation in November 2022 and that the District delayed in providing the Student an IEP, after failing to follow referral and evaluation timelines.

First, OSPI must determine when should be considered the Parent's referral for special education. Any person who is knowledgeable about the student may make a referral of a student suspected of having a disability. A referral may be implied when a parent informs a school that a child may have special needs.

The Parent stated that she referred the Student on November 29, 2022, when she emailed the school counselor a private evaluation of the Student and stated, "at some point, after the new year, we'll need to sit down and discuss how this new information affects [Student's] learning and the accommodations that will be necessary to maximize her learning." The email subject line was "[Student] 504/IEP." While the private evaluation did identify the Student as having a disability, the District was already aware of this as the Student had a 504 plan. The District explained that the school counselor had previously worked with the Parent and Student on the Student's 504 plan and that the prior conversations they had were centered around the 504. The school counselor thus interpreted the Parent's November 2022 email to be about the 504 and noted that it was a continuation of a conversation they were having about accommodations. The school counselor stated that the first clear indication the Parent was seeking special education services was in January 2023. OSPI finds that the District's explanation of why November 29, 2022 was not treated as the referral date was reasonable and given the circumstances did not start the referral timeline.

OSPI does note concerns about what the District ultimately identified as the referral date. Here, the District identified April 11, 2023 as the referral date, which was when the District received the "Parent Referral" form that it requested the Parent complete. However, OSPI finds that the actual referral date was January 27, 2023, when the Parent emailed the school counselor and asked, "could we get the ball rolling for the IEP for [Student]." Here, the Parent clearly requested an IEP. At this point, the District should have documented the referral and provided the Parent with written notice that the Student has been referred because of a suspected disabling condition and that the District, with Parent input, would determine whether there is sufficient data to suspect a disability. Then the District must review the referral, and it must collect and examine existing school, medical, and other records. The District must determine within 25 school days after receipt of the referral whether it will evaluate the Student.

While having the "Parent Referral" form was helpful and contained important information, this should have been part of the information collected during the 25 school days after receipt of the referral, not the start of the referral period. The regulations do require a referral to be in writing; however, there is no requirement to use a specific form. It appears the school psychologist misunderstood this, while as the psychologist correctly provided the Parent information about the special education process on or around February 1, 2023, but the psychologist failed to recognize that the Parent had already made a referral in writing: the Parent's email asking to engage in the process of getting an IEP was a referral. Thus, the referral timeline began on January 27, 2023. Given this, the District should have decided whether to evaluate the Student by March 17, 2023. Instead, the District determined on April 21, 2023, it would evaluate the Student. OSPI finds a violation as the District did not correctly document the referral or follow the referral timeline.

Next, when the student is to be evaluated to determine eligibility for special education services, the district shall fully evaluate the student and arrive at a decision regarding eligibility within 35 school days after the date written consent for an evaluation has been provided to the school district by the parent. Here, the District received the Parent's May 1, 2023 consent for the special education evaluation on May 2, 2023, and completed the evaluation and made an eligibility determination on May 26, 2023, within 35 school days. OSPI finds the District followed the evaluation timeline. Although, as noted above, the process should have begun earlier, estimating that the Parent could have provide consent by around March 28, 2023, if the District took the full 35 school days, the evaluation would have been completed around May 22, 2023; however, if the District took the 18 school days it actually completed the evaluation in, the Student's evaluation could have been completed by the end of March 2023.

Finally, for an initial IEP, a school district must ensure that it holds a meeting to develop the student's IEP within 30 calendar days of a determination that the student is eligible for special education and related services. The District met this deadline, as it determined the Student eligible on May 26, 2023, and developed the IEP on June 23, 2023. Again, though, this could have been completed by the end of April 2023, had the District begun the referral timeline in January 2023.

Ultimately, the impact of the delayed timeline on the Student was limited. The Parent, as discussed below, disagreed with the eligibility decision, and therefore did not sign consent for the initial provision of services until August 21, 2023. Importantly, OSPI notes that a district must obtain informed consent from the parent of the student before the initial provision of special education and related services to the student and technically a district is not required to hold the IEP meeting or develop an IEP until consent for the provision of services is provided. Here, the District did develop the IEP within the initial IEP timeline, but the District did not fail to provide services as consent was not signed until August 2023.

Given this, OSPI finds that while the District was in violation related to the referral timeline, this violation alone did not delay the Student's receipt of special education services. As such, the District will be required to develop and disseminate written guidance on referral procedures and timelines.

Issue Two: Eligibility Determination – The Parent alleged the District did not sufficiently evaluate the Student and address her autism, and thus failed to identify the proper disability eligibility category.

A student eligible for special education means a student who has been evaluated and determined to need special education because he or she has a disability in one of the eligibility categories listed in regulation and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations. A student's eligibility category does not determine services. An evaluation should be sufficiently comprehensive to identify all the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.

Here, the evaluation group determined the Student was eligible for special education services in May 2023 under the eligibility category emotional behavioral disability. The evaluation report included the emotional behavioral disability criteria and described the impact of the Student's disability—including struggles with attendance, class avoidance, social interactions, and responding to conflict—on her education, participation in school, and positive relationships. The evaluation report recommended the Student receive specially designed instruction in adaptive/self-help skills and social skills.

The Parent disagreed with the eligibility category and felt the evaluation did not sufficiently address the Student's autism. However, the evaluation report included information from a variety of sources and assessment tools, including the private November 2022 psychological evaluation, which included the "Behavior Assessment system for Children – 3" (BASC-3) – Parent, teacher, and self-report forms and addressed behavior and adaptive needs, upon which the Student fell within the at-risk or clinically significant categories and which utilized the "Autism Diagnostic Observations Schedule-2 (ADOS-2)". The District's evaluation also included medical information, including that the Student had a diagnosis of "autism spectrum disorder – level 1", "unspecified anxiety disorder", and "major depressive disorder; and documented input from the Student's general education teachers, results from the "SSIS Social-Emotional Learning (SEL) Edition" – teacher rating scales; and included information from the assessments in fine motor and observations.

In the District's response, the school psychologist explained that they reviewed the private evaluation and that the "eligibility category of Emotional/Behavioral Disability was determined to best reflect [Student's] educational needs." The psychologist stated that "with examination of all available information and positive intent I opine [Student's] mental health/emotional disability to adversely impact her education in four of the five listed areas [in the definition of emotional behavioral disability]" and that "mild autism traits were established via independent evaluation, however in my opinion are not the sole reason for [Student's] struggles."

Ultimately, to address the Parent's concerns, the District agreed to do a reevaluation and as discussed below, included a functional behavioral assessment (FBA). The reevaluation was completed in October 2023, and the District agreed to switch the Student's eligibility category to autism. There were no changes to the Student's proposed areas of specially designed instruction between the two evaluations and the updated IEP reflected no substantive changes in special education services or supports due to the change in eligibility category.

Ultimately, OSPI finds that the District's initial evaluation was sufficient, acknowledged the Student's autism diagnosis, and the evaluation group made an appropriate eligibility determination based on the evaluation and Student specific needs and information. While the Parent may have disagreed, the classification as an emotional behavioral disability for purpose of eligibility for special education was reasonable. The eligibility category was changed in fall 2023, which addressed the Parent's primary concern; and regardless of that change, there was not a significant impact on the Student's services and supports. OSPI finds no violation.

Issue Three: FBA & BIP – The Parent alleged the District failed to address the Student’s behavior needs and did not conduct an FBA or provide a BIP.

As discussed above, the Parent disagreed with the Student’s identification has having an emotional behavioral disability for purpose of special education eligibility. In part, the Parent felt that the Student’s behaviors were “symptoms of autism”, that the evaluation did not adequately address the Student’s behavior and discipline, and that if the Student had an emotional behavioral disability, the District should have conducted an FBA and developed a BIP.

An FBA focuses on identifying the function or purpose behind a child’s behavior. 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.

The District responded that an FBA was not included in the initial evaluation because upon receipt of the referral, “a review of discipline information to date did not indicate a pattern of behavior that would warrant an FBA/[behavior intervention plan] BIP.” Despite not specifically conducting an FBA, the initial evaluation did address behavior and the initial IEP indicated that the Student’s “behaviors of not turning in classwork are impeding her learning,” but that, at that time, the Student was not “displaying behaviors that impede the learning of others.” The IEP included goals and specially designed instruction adaptive/self-help (to do list, sensory) and social (social management), which sought to address identified behaviors like not turning in classwork. The IEP also included accommodations, some of which were related to behavior such as breaks to visit the “clinic/counseling center.” Ultimately, an FBA was conducted in fall 2023 and a BIP was developed. The BIP included information on the Student’s strengths, a summary of data collected, information about factors that contribute to the Student’s behaviors, a target behavior— “effectively communication frustrations after an injustice”— and intervention strategies. The prior written notice, documenting the BIP development, noted that previously the Student “has become so frustrated that she has engaged in behaviors that resulted in discipline” and that the team was “initiating a plan to be proactive in addressing her needs and providing support in order to avoid future circumstances.”

While an FBA was conducted and a BIP developed in fall 2023, OSPI finds that the lack of an FBA does not render the initial evaluation in May 2023 insufficient as the evaluation and initial IEP addressed concerns around behavior and provided social skills instruction and other strategies and supports for behavior like accommodations. Ultimately, an FBA was conducted and BIP developed, thus addressing the Parent’s request and concern. OSPI finds no violation.

Issue Four: Special Education Discipline – The Parent alleged the District improperly expelled the Student without addressing her special education needs.

School districts may remove a student eligible for special education who violates a code of student conduct from her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days to the extent those

alternatives are applied to students without disabilities. Additional special education discipline regulations apply if a student's placement is changed via discipline.

Here, the Student was emergency expelled on April 13, 2023, following a behavioral incident. The Parent appealed the discipline, a hearing was held, and the discipline was converted to a five-day, out-of-school suspension. The Student was out of school on the suspension on April 14, 17, 18, 19, and 20, 2023. The Student, who was in the process of being evaluated for special education eligibility, was suspended for five days, thus additional discipline regulations do not apply, and the District was allowed to issue discipline for a code of conduct violation as occurred here.

While the Parent stated in an email that the Student missed 10 days of school due to the discipline, this is not reflected in the documentation. The Student's emergency expulsion was converted to a five-day suspension and the Student's attendance records indicate she missed five days of school due to that. The Student missed another five days of school immediately after the suspension, but these were days the Parent called in to the District to get excused absences for the Student. The District emphasized that the Student was welcome back at school on April 21, 2023, and that this was communicated to the Parent and Student at the discipline appeal hearing.

The Parent also expressed concern that the Student was not provided homework or "help with...homework" during the suspension. A school district is only required to provide services during periods of removal to a student eligible for special education who has been removed from her current placement for 10 school days or fewer in that school year, if it provides services to a student without disabilities who is similarly removed. It is not clear that the Student was provided homework during the suspension; however, multiple emails show that the principal and Student's teachers worked with the Student to discuss missing work, how the Student could complete that work, and which assignments the Student could complete to show comprehension.

Overall, OSPI finds that the District did not violate special education discipline regulations.

Issue Five: Records Request – The Parent alleged the District failed to provide requested records. Primarily, the Parent seemed to be concerned that she requested, in a June 5, 2023, "dispute letter" regarding the evaluation, vision and hearing screenings, results of the social, adaptive/self-help, and behavior evaluations, and results of the "Pearson's test."

Districts must permit the parents of a student eligible for special education to inspect and review, during school business hours, any educational records relating to the student that are collected, maintained, or used by the district. The district must comply with a request promptly and before any meeting regarding an IEP or provision of a free appropriate public education (FAPE) to the student. The district must respond in no more than 45 calendar days after the request has been made. The right to inspect and review educational records includes: the right to a response from the district to a reasonable request for explanations and interpretations of the records; the right to request that the district provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising their right to inspect and review the records; and the right to have a representative of the parent or adult student inspect and review records.

In its response, the District stated that “it was shared that [the Parent] could review the protocols and information” and that it “does not appear anything was schedule to review in person.” The District further provided that ultimately, they held several meetings to review and discuss the evaluation between the end of May and into June 2023. The meetings were attended by at least one school psychologist, the principal, the special education teacher, the Parent, and the Student. The director stated she attended a couple of the meetings, but not all. The director stated it was communicated to the Parent at these meetings that they could schedule a time for the Parent to review the records she requested and that they could go over all the protocols and records and explain the documents. The director stated the Parent did not schedule a time to review records.

OSPI notes that the District must permit the Parent to review records; yet, given that these were all records related to the evaluation, the most effective place to review those records was at the evaluation meetings that were held, and it is likely that these records were discussed with the Parent at the evaluation meetings. There was no indication that reviewing the records with District staff were an ineffective way for the Parent to exercise her right to inspect and review the records. Thus, OSPI finds the District offered the Parent the opportunity to review and inspect records. OSPI finds no violation. However, if the Parent still has questions about certain records, OSPI recommends the Parent clarify which records she would like to review and that the District set up a time to review the records with the Parent and provide any necessary explanation.

Issue Six: Bullying – The Parent alleged the District failed to address bullying of the Student and that this negatively impacted the Student’s attendance, mental health, and school success/grades.

Each school district shall adopt a policy and procedure that prohibits the harassment, intimidation, or bullying of any student. 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. 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.

That Parent, in her complaint and reply to the District’s response, stated that she did not know there was a formal process or procedure she should be using for bullying concerns, despite sharing concerns via email about “problems [Student] has had with her classmates.” The Parent stated there was documentation “over the years” that the Student has been bullied and cited specific examples from 2021 and 2022. OSPI notes that the one-year complaint investigation timeline began on December 20, 2022, and therefore, OSPI cannot address potential violations that occurred prior to this date.³

After December 20, 2023, there are some examples of the Student having conflict with peers. For example, on April 25, 2023, the principal and a teacher emailed regarding how the teacher should

³ The District’s response contained documentation—a timeline and emails—regarding other concerns about bullying the Parent and Student raised between 2016 and September 22, 2022. OSPI notes this indicates the District had been tracking and addressing the Parent’s concerns.

communicate regarding "issues with peers" and the Student. The teacher asked if she should use a "bullying form." The principal responded that the teacher could let him, or the school counselor know if the Student was "having a particular struggle with an issue or a person so we could address it right away." The Student also, during the 2022–23 school year, had 46.5 days of excused absences, for a variety of reasons, including some absences labeled "mental health", which the Parent stated were due to bullying. The Parent also alleged the Student was being bullied by teachers and gave the examples of a teacher the Student had "trouble" with in eighth grade and staff treating the Student like she was a threat due to her expulsion.

Overall, while OSPI understands the Parent's concern, the investigation does not support a finding that bullying meeting the legal definition has occurred. The Student has had struggles with peers and potentially teachers and has a need for specially designed instruction related to social skills and other behavior supports. However, as discussed above, the District can discipline students within the general and special education discipline frameworks and therefore, the District disciplining the Student is not an example of bullying. The District, throughout the period investigated, was also in the process of evaluating the Student, developing an IEP, and beginning to provide special education services. The Parent argues that the Student was struggling academically, which may indicate the need for special education supports. Further, while there are only a few examples, it does appear the District was responsive when concerns were raised as evidenced by the teacher seeking out who she should communicate concerns to and the principal responding that they would address concerns. While OSPI finds no violation, it recommends District staff and the Student's IEP team continue to be responsive should the Parent or Student raise concerns about potential bullying.

CORRECTIVE ACTION

By or before **March 8, 2024** and **March 29, 2024**, the District will provide documentation to OSPI that it has completed the following corrective action.

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

Written Guidance

By **March 22, 2024**, the District will ensure that the following individuals receive written guidance on the topics listed below: special education administrators, principals, school counselors, school psychologists, special education teachers, and any other staff typically involved in the special education referral process at the middle school that the Student was enrolled in during the 2022–23 school year. The guidance will include examples and discussion of best practices.

- Referral Process: Legal requirements, timelines;
- Examples of what would trigger the referral timeline; and,
- Discussion of appropriate use of the District's parent referral form.

By **March 8, 2024**, the District will submit a draft of the written guidance to OSPI for review. OSPI will approve the guidance or provide comments by March 15, 2024.

By **March 29, 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 13th day of February, 2024

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.)