

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 24-42

PROCEDURAL HISTORY

On March 25, 2024, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the aunt (Complainant) of a student (Student) attending the Kennewick School District (District). The Complainant alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On March 25, 2024, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on March 26, 2024. OSPI asked the District to respond to the allegations made in the complaint.

On March 26, 2024, the Complainant provided OSPI with a release of information signed by the Parent, permitting OSPI to share personally identifiable information on the Student under the Family Educational Rights and Privacy Act (FERPA), with the Complainant.

On April 22, 2024, OSPI received the District's response to the complaint and forwarded a copy to the Complainant on the same day. OSPI invited the Complainant to reply.

On May 7, 2024, OSPI requested that the District provide additional information, and the District provided the requested information on May 7, 2024. OSPI forwarded the information to the Complainant on May 17, 2024.

On May 8, 2024, OSPI's investigator conducted interviews of the behavior program teacher, the paraeducator, and the general education teacher.

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

ISSUES

1. Beginning with the 2023–24 school year, did the District follow proper procedures for implementing the Student's individualized education program (IEP)?
2. Beginning with the 2023–24 school year, did the District follow proper special education discipline procedures, specifically regarding any in-school suspensions?
3. Beginning with the 2023–24 school year, did the District follow proper special education restraint procedures?

LEGAL STANDARDS

IEP Implementation: A district must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is

shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a [student with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Provider Responsibility for Implementation: Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. Each IEP service provider must be clearly informed of his or her responsibilities related to IEP implementation. 34 CFR §300.323(d)(1); WAC 392-172A-03105(3)(a).

Parent Participation in IEP Meetings: Parents of a child with a disability will participate with school personnel, in developing, reviewing, and revising the student's IEP. This is an active role in which the parents: provide critical information regarding the strengths of their child, and express their concerns for enhancing their child's educational program; participate in discussions about their child's need for special education, related services, and supplementary aids and services; and join with other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 5).

IEP Definition: An IEP must contain, in part, a statement of the special education services, related services to be provided to the student. 34 CFR §300.320; WAC 392-172A-03090.

Provision of Services: Special education and related services must be provided by appropriately qualified staff. Other staff including general education teachers and paraprofessionals may assist in the provision of special education and related services, provided that the instruction is designed and supervised by special education certificated staff, or for related services by a certificated educational staff associate. Student progress must be monitored and evaluated by special education certificated staff or for related services, a certificated educational staff associate. 34 CFR §300.156; WAC 392-172A-02090(i).

IEP Revision: A student's IEP must be reviewed and revised periodically, but not less than annually, to address: any lack of expected progress toward annual goals or in the general education curriculum; the results of any reevaluations; information about the student provided to, or by, the parents; the student's anticipated needs; or any other matters. 34 CFR §300.324(b); WAC 392-172A-03110(3).

Compensatory Education: A state educational agency is authorized to order compensatory education through the special education community complaint process. *Letter to Riffel* 34 IDELR 292 (OSEP 2000). Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31, (9th Cir. 2011). There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). The award of compensatory

education is a form of equitable relief and the IDEA does not require services to be awarded directly to the student. *Park ex rel. Park v. Anaheim Union School District*, 464 F.3d 1025, 46 IDELR 151 (9th Cir. 2006).

"There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting." *In re: Mabton School District*, 2018-SE-0036.

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).

Restraint: Restraint as defined in RCW 28A.600.485 means: Physical intervention or force used to control a student, including the use of a restraint device to restrict a student's freedom of movement. WAC 392-172A-01162.

Restraint Conditions: Restraint shall be used only when a student's behavior poses an imminent likelihood of serious harm. The use of restraint as defined by RCW 28A.600.485 is subject to each of the following conditions: a) the restraint must be discontinued as soon as the likelihood of serious harm has dissipated; b) The restraint shall not interfere with the student's breathing; and c) any staff member or other adults using a restraint must be trained and certified by a qualified provider in the use of such restraints, or otherwise available in the case of an emergency when trained personnel are not immediately available due to the unforeseeable nature of the emergency. School districts must follow the documentation and reporting requirements for any use of restraint consistent with RCW 28A.600.485. WAC 392-172A-02110.

Likelihood of Serious Harm: Likelihood of serious harm as defined in RCW 71.05.020 means: (1) A substantial risk that: (a) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide, or inflict physical harm on oneself; (b) Physical harm will be inflicted by a person upon another, as evidenced by behavior that has caused such harm or that places another person or persons in reasonable fear of sustaining such harm; or (c) Physical harm will be inflicted by a person upon the property of others, as evidenced by behavior that has caused substantial loss or damage to the property of others; or (2) The person has threatened the physical safety of another and has a history of one or more violent acts. WAC 392-172A-01109.

Follow-up and Reporting Requirements: School districts must follow the documentation and reporting requirements for any use of isolation or restraint consistent with RCW 28A.600.485. WAC 392-172A-02110. Following the release of a student from the use of restraint or isolation, the

school must implement follow-up procedures. These procedures must include reviewing the incident with the student and the parent or guardian to address the behavior that precipitated the restraint or isolation and the appropriateness of the response, and reviewing the incident with the staff member who administered the restraint or isolation to discuss whether proper procedures were followed and what training or support the staff member needs to help the student avoid similar incidents. RCW 28A.600.485.

Any school employee, resource officer, or school security officer who uses isolation or restraint on a student during school-sponsored instruction or activities must inform the building administrator or building administrator's designee as soon as possible, and within two business days submit a written report of the incident to the district office. The written report must include, at a minimum, the following information: the date and time of the incident; the name and job title of the individual who administered the restraint or isolation; a description of the activity that led to the restraint or isolation; the type of restraint or isolation used on the student, including the duration; whether the student or staff was physically injured during the restraint or isolation incident and any medical care provided; and any recommendations for changing the nature or amount of resources available to the student and staff members in order to avoid similar incidents. The principal or principal's designee must make a reasonable effort to verbally inform the student's parent or guardian within twenty-four hours of the incident, and must send written notification as soon as practical but postmarked no later than five business days after the restraint or isolation occurred. If the school or school district customarily provides the parent or guardian with school-related information in a language other than English, the written report under this section must be provided to the parent or guardian in that language. RCW 28A.600.485.

FINDINGS OF FACT

1. At the start of the 2023–24 school year, the Student was eligible for special education services under the category of developmental delay, was in the third grade, attended a District elementary school, and the Student's February 2023 individualized education program (IEP) was in effect.
2. The February 2023 IEP included the following annual goals, with progress to be reported each trimester:
 - Social: "Student will raise his score on the Social Skills Rating Scale from 2.6 to 3.0"
 - Behavior: "Student will raise his score on the Behavior Skills Rating Scale from 2.0 to 2.75"

The Student's February 2023 IEP provided the Student with the following non-concurrent specially designed instruction (SDI) in a *special education setting*:

- Social: approximately 9 hours a week (to be provided by a special education teacher)
- Behavior: 10 hours a week (to be provided by a special education teacher)

The IEP included the following accommodations: shortened assignments; modify/repeat/model directions; extra time to complete assignments; provide small group and individualized instruction; preferential seating; reduce environmental distractions; speech-

to-text; text-to-speech; utilize oral responses to assignments/assessments; extra time on quizzes; allow breaks; and behavior plan/contract.

The IEP indicated the Student would spend "0% to 39%" in the *general education setting*.

The February 2023 IEP noted the Student had some social strengths but also had "frustration with difficult situations" and would "hurt...social relationships." Furthermore, the February 2023 IEP observed that the Student did have several behavior strengths, but did demonstrate "refusal" and that he needed "many reminders to get him on task."

3. The Student also had a behavioral intervention plan (BIP), dated February 21, 2023. It targeted the following behaviors: elopement; school refusal; "unsafe behavior"; and verbal aggression.

It read, in part, "Student currently demonstrates difficulty regulating his emotions. He has repeated outbursts at school that range from being upset and leaving the classroom to destroying property and occasionally targeting other people." The February 2023 BIP provided the Student with the following supports: visual schedule to help with transitions; time to support increasing work completion; reward system; work/break system; "teaching Student how to ask for help"; preferred activities; token economy; daily behavior chart; and "ability to earn free choice after each successful work session."

4. The District's 2023–24 school year began on August 30, 2024.

5. According to the Complainant:

[Student reported] all he has been given is 'color[ing] pages.' Student's IEP minutes were not being followed as he rarely had access to general education and Student was not being taught [while in] in Tier 2. Tier 2 was being used as retroactive punishment and in-school suspension. During [his time in Tier 2] he was not given schoolwork.

...

There were times when the vice principal's office was utilized as in-school suspension and he was still not offered school work.

6. The District's response read, in part:

For the 2023-2024 School Year Student was enrolled in [school's] Special Services Tier 2 Behavior Program. The Tier 2 Behavior Program is a program that consists of strength-based therapeutic classrooms dedicated to students who struggle with dysregulation and require extensive behavioral support due to emotional stressors. Within a supportive and collaborative environment, the goal is to equip Student with positive coping strategies and behavioral skills so he will succeed academically, in the community, and the workplace.

...

The Tier 2 Behavior Program is designed to be a fluid program meaning that the number of minutes listed on the individualized educational [program] for services in the Tier 2 program can be considered as an estimate of service time.

...

Students have a set schedule that is reflected on the service matrix; however, if/when Student is showing a pattern of continuous dysregulation he may spend more time in Tier 2 classroom.

...

For the 2023-2024 school year, Student showed an increased interest in going to his general education classroom. You can see a progression over the school year that Student started to spend more and more time in the general education classroom.

7. According to an email authored by the general education teacher:

At the start of the...school year, Student joined his general education peers for morning meeting, specials, lunch and recesses, and social emotional learning.

In November 2023, the Tier II behavior teacher and I obtained permission from Parent on the phone to increase Student's general education time. He began staying in [general education class] for 30 minutes [for] reading/writing and [30 minutes for] math.

8. According to an email authored by the general education teacher, beginning "around January [2024]", the Student's schedule was as follows:

- 8:40 AM – 9:00 AM: General Education Setting: Morning Meeting and Breakfast
- 9:00 AM – 9:50 AM: General Education Setting: Specials
- 9:50 AM – 11:10 AM: General Education Setting: Reading and Writing
- 11:10 AM – 12:00 PM: General Education Setting: Lunch and Recess
- 12:00 PM – 12:35 PM: General Education Setting: Social Emotional Learning
- 12:35 PM – 1:15 PM: Special Education Setting: "Special Education Room"
- 1:15 PM – 1:35 PM: General Education Setting: Recess
- 1:35 PM – 3:10 PM: General Education Setting: Math
- 3:10 PM: "Pack Up and Dismissal"

9. The District's response included approximately 170 pages of "Daily Behavior Data for Tier II" sheets (behavior tracking charts), dated from August 30, 2023 through March 14, 2024.

These sheets tracked how many reminders staff needed to give the Student in relation to the following behaviors: safe behavior; ability to follow daily schedule; emotional regulation; "respectful"; social communication; and coping skills. According to these sheets, on at least three occasions, the Student went to either the office or the nurse's room to change clothes.

10. According to a "Documentation of Restraint/Isolation" document, on November 2, 2023, the Tier II behavior teacher administered a six-minute isolation of the Student. According to the documentation, in part:

Student went into quiet room but began repeatedly banging on window with closes fists. When he was redirected and his hands were blocked from hitting the window, Student began repeatedly hitting his head against the wall and then kicking, scratching, and hitting staff...Out of concern of the window breaking and the safety of himself and staff, Student was escorted to the isolation room to de-escalate. He was given the expectation to sit down with a calm/safe body. After 6 minutes, Student complied and the door was opened.

Said document stated the Parent was informed of the isolation via two voicemails, on November 3 and 6, 2023. And that "written notice [was] mailed home" on March 28, 2024.

During her interview with OSPI's investigator, though, the Tier II behavior program teacher stated the Student began to hit both herself (the Tier II behavior program teacher) and the

paraeducator after the Student was blocked from hitting the window, and that, at this time, the Tier II behavior program teacher and the paraeducator each 'carried the Student under the arm – one on each side'¹ into isolation room. (The Tier II teacher also stated it was a 'two-person CPI escort.')

11. A November 20, 2023 progress reporting showed the following:

- Social: Not Mastered: 2.48. "Student's relative strengths are greeting others and conversations. Student continues to work on asking for help and expressing his feelings appropriately."
- Behavior: Not Mastered: 2.16. "Student's relative strengths are following school rules and complying with teacher requests. Student is working on skills to demonstrate flexibility."

12. The District was on break November 23–24, 2023 and December 21, 2023 through January 2, 2024.

13. According to the District's response, in February 2024:

As per Student's daily behavior tracking forms, you can see an increase in Student's eloping behaviors from the general education classroom. The Tier 2 Behavior Program teacher looking at the current data decided to have a reset day. Having more time in Tier 2 allowed the teacher to assess current academic levels for an upcoming IEP meeting, reteach general education classroom expectations, and recess expectations, and develop a plan with the Student to stop the unsafe eloping behaviors.

Eloping behaviors were happening after lunch recess. The parent was informed of alternative recess by a Tier 2 teacher through Parents Square.

14. On February 16, 2024, the assistant principal wrote the Parent, stating, in part, "Student is doing very well in his general education classroom with his Tier 2 Behavioral Supports."

15. According to the District's response:

As per Student's Emergency Response Protocol Addendum to the IEP (2/21/2023) – it states that if Student does not calm within 30 minutes the team will call the parent to inform. Parent was [generally] not called and asked to pick-up Student; [generally], the school was notifying her of Student's current dysregulated state per his Emergency Response Protocol.

16. On February 26, 2024, the assistant principal wrote, in an email:

[The last two years] Student spend very little time in his general education classrooms due to his special needs and his refusal to go into his general education classrooms...This school year he has increased the amount of time he...wanted to be in the general education classroom. He has been participating in his general education classroom and completing classroom assignments with modifications.

17. On February 26, 2024, the Complainant expressed concern the Student was not being provided with "modified assignments."

¹ Paraphrasing.

18. According to a "Documentation of Restraint/Isolation" document, on February 27, 2024, the Tier II behavior teacher and assistant principal administered a one-minute restraint and a nine-minute isolation. According to the documentation, in part:

Student eloped [to the playground area and] verbalized he was going to beat up [his brother, who was playing on the playground] and Student ran toward [his brother]. Staff attempted to block and redirect. Student...hit [his brother] and continued attempting to hit, with staff blocking.

Student was then escorted back to room 7 and placed in isolation at 12:25 as he was unable [to] calm his body...After 9 minutes, Student complied [with safe body directives] and [the] isolation [was] ended.

Said document stated the Parent was informed of the isolation and restraint at 7:25 pm on February 27, 2024. And that "written notice [was] mailed home" on February 28, 2024.

19. In additional information provided to OSPI during this investigation, the District wrote:

We attempted to meet and present our annual IEP on February 29th, but the family rejected the IEP and requested a full, early re-evaluation before they'd agree to another IEP. We just completed the requested re-evaluation on April 25th and the new (late annual) IEP meeting is scheduled for May 23, 2024. As a result of this request, we have d-counted the student.

20. The Student was assigned an out-of-school suspension on March 4, 2024, which began at approximately 12 pm that day.

21. A District-authored letter included with the Complainant's investigation request read, in part:

Because Student was non-responsive to...interventions...and has a history of repeated behavioral violations following multiple attempts at supporting him, the decision was made to administer a short-term in-school suspension.

The short-term suspension will begin on March 5, 2024 and ends on March 6, 2024.

During this investigation, the District clarified the Student attended school again, starting March 6, 2024.

22. In a March 5, 2024 email, the Complainant wrote, "Tier 2...is for his behaviors so that Parent is not having to pick Student up during work, [and] why [is] recess [deprivation] used as a punishment frequently? Especially for something as small as [Student's] foot touching the rocks while in the bus line."

23. In a March 13, 2024 email, the Tier II behavior teacher emailed the Parent several examples of "interventions and positive reinforcements" used with the Student. These included, in part: daily reward; "class cash"; "eagle bucks"; breaks upon request; positive affirmations; deep breathing; planned ignoring; first/then; calm down space; and visual timers.

24. The District was on break April 1-5, 2024.

25. On April 25, 2024, the District's group of qualified professionals completed a reevaluation of the Student. The group of qualified professionals found the Student eligible for special education services under the category of specific learning disability, and recommended the Student receive SDI in behavior, reading, written expression, and math.
26. Beginning sometime late April or early May 2024, the Student began attending a Tier II behavior program at a different school building within the District. According to the District, the Student had 9 absences and 16 tardies through March 2024, but has had no recorded absences or tardies since attending the new building.

According to the Parent, "the difference between [what was provided to Student at the first school and what was provided to Student at] the new school – and what [the new school] was able to accomplish in only four days [shows] FAPE [was not provided by the first school]."

27. On May 8, 2024, OSPI's investigator conducted interviews of the Tier II behavior program teacher, the paraeducator, and the general education teacher. OSPI's investigator notes regarding those interviews included, in part, the following:
- During her interview with OSPI's investigator, the general education teacher asserted that approximately 35 minutes each day were devoted to the provision of SDI to the Student. And while the general education teacher did work with the Student's behavior tracking chart, which listed certain social-emotional-behavior skillsets relevant to the Student's development, during the interview, the general education teacher described schoolwork in this area that was related to a school-based curriculum, as opposed to the Student's specific IEP goals. Furthermore, the general education teacher acknowledged she never reviewed the Student's IEP goals, and provision of related SDI, with the special education teacher.
 - In her interview with OSPI's investigator, the general education teacher stated (paraphrased): in January 2024, the Student was 'almost completely' in the general education setting...'He'd spend 40 minutes in the Tier 2 setting but he remainder – about 85% -- was in the general education setting.'
 - During their respective interviews with OSPI's investigator, both the Tier II behavior program teacher and the paraeducator were able to describe, in detail, the social and behavior instruction they provided to the Student. Said instruction included, in part: working with the 'Journey curriculum'; progressing through various 'Spot Feelings' books; assisting the Student in increasing his independence; demonstrating 'safe body' protocols to the Student; practicing social interactions; and collaborating creative ways to address hypothetical interpersonal disputes.
 - During their respective interviews, both the Tier II teacher and the paraeducator stated they did not recall any incidences wherein the Student was sent to the office as punishment for behaviors.

CONCLUSIONS

Issue 1: IEP Implementation – The Complainant alleged the District did not follow proper procedures for implementing the Student's February 2023 IEP. Specifically, the Complainant alleged the Student was not being provided with specially designed instruction while in the Tier 2 Behavior Program.

Here, OSPI makes two preliminary observations.

First, the February 2023 IEP goals were written as follows: (1) social: "Student will raise his score on the Social Skills Rating Scale from 2.6 to 3.0"; and (2) behavior: "Student will raise his score on the Behavior Skills Rating Scale from 2.0 to 2.75." While the February 2023 did detail some of the Student's strengths in each area², these goals are impermissibly vague, in the sense that relevant service providers reviewing the goals might not understand what SDI is supposed to look like for this Student. (Each IEP service provider must be clearly informed of his or her responsibilities related to IEP implementation.) For example, which skills was the Student actually working on for each goal, and thus being provided instruction on?

The wording of the goals also raises parent participation concerns. Parents of a child with a disability will participate with school personnel, in developing, reviewing, and revising the student's IEP. This is an active role in which the parents provide critical information regarding the strengths of their child, and express their concerns for enhancing their child's educational program. With the current wording, it is unclear whether a parent would properly appreciate the content of a given progress report, such that the parent would be empowered to be a full member of the student's IEP team.

Said wording, then, represents a violation of the IDEA. To remedy this violation, the IEP team will be required to meet to re-draft the goals. The newly developed language will identify specific skill sets, and include a measurement that will be clearly understandable to an individual without a special education certificate.

Second, an IEP must contain, in part, a statement of the special education services, related services to be provided to the student. Furthermore, a district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Here, the February 2023 IEP did specifically identify the SDI that was to be provided to the Student – approximately nine hours in social a week and ten hours in behavior a week. According to the District, though:

The Tier 2 Behavior Program is designed to be a fluid program meaning that the number of minutes listed on the individualized educational [program] for services in the Tier 2 program can be considered as an estimate of service time.

...

Students have a set schedule that is reflected on the service matrix; however, if/when Student is showing a pattern of continuous dysregulation he may spend more time in Tier 2 classroom.

Here, the Student received most all his SDI while in the Tier 2 *setting*. For example, the Tier 2 special education teacher and paraeducator only worked with the Student when the Student was

² For example, the February 2023 IEP noted the Student had some social strengths, but also had "frustration with difficult situations" and would "hurt...social relationships." Similarly, the February 2023 IEP observed that the Student did have several behavior strengths, but did demonstrate "refusal" and that he needed "many reminders to get him on task."

in the Tier 2 *setting*.³ And, according to the documentation and staff interviews: at the start of the 2023–24 school year, the Student spent the majority of his school day in the Tier 2 setting; beginning no later than January 2024, though, the Student was spending most of his day in the *general education setting*⁴; and at no point was the Student’s February 2023 IEP service matrix revised to accurately reflect the SDI that was now being provided to the Student. This represents a violation of the IDEA; a student’s IEP must be reviewed and revised whenever a change in need resulting from the student’s disability warrants a change in services. To remedy this violation, the Student’s IEP team will be required to develop an IEP that states the actual SDI minutes provided to the Student. Training regarding the foregoing requirement will also be required of certain District staff.

Third, in terms of the SDI and accommodations that were actually provided to the Student, it is clear the Student was provided with some SDI in social and behavior, as well as the listed IEP accommodations. For example, in part: the behavior tracking charts showed Student was regularly provided instruction on safe behaviors, daily schedules, emotional regulation, social communication, and coping skills between August 30, 2023 and March 14, 2024; November 20, 2023 progress reporting showed the Student made an improvement of 0.16 on his February 2023 behavior goal⁵; in a March 13, 2024 email, the Tier II behavior teacher listed 10 different “interventions and positive reinforcements” she had used with the Student throughout the school year; and during their respective interviews with OSPI’s investigator, both the Tier II behavior program teacher and the paraeducator were able to describe, in detail, the social and behavior instruction they provided to the Student.

As detailed above, though, no later than January 2024, the Student was likely not receiving the full 19 hours of SDI included in the February 2023 IEP; again, the Student received most all his SDI in the Tier II *setting*, and no later than January 2024, the Student was spending most of his day in

³ The Student likely received some SDI while in the general education setting—see below—but it is not clear how much SDI the Student received in that setting. For example, during her interview with OSPI’s investigator, the general education teacher asserted that approximately 35 minutes each day were devoted to the provision of SDI to the Student. And while the general education teacher did work with the Student’s behavior tracking chart, which listed certain social-emotional-behavior skillsets relevant to the Student’s development, during the interview, the general education teacher described schoolwork in this area that was related to a school-based curriculum, as opposed to the Student’s specific IEP goals. Furthermore, the general education teacher acknowledged she never reviewed the Student’s IEP goals, and provision of related SDI, with the special education teacher. (Special education and related services must be provided by appropriately qualified staff. Other staff, including general education teachers and paraprofessionals, may assist in the provision of special education and related services, provided that the instruction is designed and supervised by special education certificated staff.)

⁴ In her interview with OSPI’s investigator, the general education teacher stated (paraphrased): in January 2024, the Student was ‘almost completely’ in the general education setting...‘He’d spend 40 minutes in the Tier 2 setting but he remainder – about 85% -- was in the general education setting.’

⁵ As of November 20, 2023, the Student experienced a regression of approximately 0.10 on his February 2023 social goal.

the *general education setting*. This represents a violation of the IDEA: 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.

To remedy this violation, certain compensatory education is warranted.

A state educational agency is authorized to order compensatory education through the special education community complaint process. Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. There is no statutory or regulatory formula for calculating compensatory remedies.

January 3 (the first day of back after winter break) through April 26, 2024 (the approximate date the Student began attending a Tier II behavior program at a different school building) represents approximately 14 weeks. During this time, then, the Student should have received approximately 266 total hours of SDI. As detailed above, the Student did receive some limited SDI in the general education setting. If the Student missed approximately 85% of the 266 total hours of SDI he should have received during this time, then the Student missed approximately 226 hours of SDI. As compensatory education, the District will provide approximately one-third of that figure—75 hours—to the Student as compensatory education.

Issue 2: Discipline – The Complainant alleged the District did not follow proper special education discipline procedures. Specifically, the Complainant alleged the “Tier II [setting] was being used as...punishment and in-school suspension [and] during [his time in Tier II] Student was not given schoolwork.” The Complainant also stated the school office was utilized as an in-school suspension space for the Student.

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.

Here, this investigation showed from the start of the school year through May 7, 2024⁶, the Student was suspended for an entirety of 1.5 school days. And as detailed above, the Student received most all his SDI while in the Tier II setting, per his IEP—the Tier II setting was not used as

⁶ The last date the District submitted information during this investigation.

a vehicle to deprive the Student of instruction or coursework. Finally, there is no indication the office was used as an in-school suspension site.⁷ OSPI does not find a violation of the IDEA.

Issue 3: Restraint – The Complainant alleged the District did not follow proper restraint procedures during the 2023–24 school year.

Restraint means physical intervention or force used to control a student, including the use of a restraint device to restrict a student’s freedom of movement. Restraint shall be used only when a student’s behavior poses an imminent likelihood of serious harm.

Likelihood of serious harm means: (1) A substantial risk that: (a) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide, or inflict physical harm on oneself; (b) Physical harm will be inflicted by a person upon another, as evidenced by behavior that has caused such harm or that places another person or persons in reasonable fear of sustaining such harm; or (c) Physical harm will be inflicted by a person upon the property of others, as evidenced by behavior that has caused substantial loss or damage to the property of others; or (2) The person has threatened the physical safety of another and has a history of one or more violent acts.

The use of restraint as defined by RCW 28A.600.485 is subject to each of the following conditions: a) the restraint must be discontinued as soon as the likelihood of serious harm has dissipated; b) The restraint shall not interfere with the student’s breathing; and c) any staff member or other adults using a restraint must be trained and certified by a qualified provider in the use of such restraints, or otherwise available in the case of an emergency when trained personnel are not immediately available due to the unforeseeable nature of the emergency. School districts must follow the documentation and reporting requirements for any use of restraint consistent with RCW 28A.600.485.

School districts must follow documentation and reporting requirements for any use of restraint. Following the release of a student from the use of restraint or isolation, the school must implement follow-up procedures. These procedures must include reviewing the incident with the student and the parent or guardian to address the behavior that precipitated the restraint or isolation and the appropriateness of the response, and reviewing the incident with the staff member who administered the restraint or isolation to discuss whether proper procedures were followed and what training or support the staff member needs to help the student avoid similar incidents.

Any school employee, resource officer, or school security officer who uses isolation or restraint on a student during school-sponsored instruction or activities must inform the building administrator or building administrator's designee as soon as possible, and within two business days submit a

⁷ The behavior tracking charts showed the Student, a least on three occasions, went into either the administrative office or the nurse’s office, but the purpose of these visits was for the Student to change clothes in a private setting. And during their respective interviews, both the Tier II teacher and the paraeducator stated they did not recall any incidences wherein the Student was sent to the office as punishment for behaviors.

written report of the incident to the district office. The written report must include, at a minimum, the following information: the date and time of the incident; the name and job title of the individual who administered the restraint or isolation; a description of the activity that led to the restraint or isolation; the type of restraint or isolation used on the student, including the duration; whether the student or staff was physically injured during the restraint or isolation incident and any medical care provided; and any recommendations for changing the nature or amount of resources available to the student and staff members in order to avoid similar incidents. The principal or principal's designee must make a reasonable effort to verbally inform the student's parent or guardian within twenty-four hours of the incident, and must send written notification as soon as practical but postmarked no later than five business days after the restraint or isolation occurred. If the school or school district customarily provides the parent or guardian with school-related information in a language other than English, the written report under this section must be provided to the parent or guardian in that language.

Here, the documentation showed two incidences of restraint, on November 2, 2023 and February 27, 2024. Each instance will be evaluated in turn.

November 2, 2023: The November 2, 2023 "Documentation of Restraint/Isolation" document does not explicitly detail a restraint. Rather, that document focuses on an isolation of the Student that took place that day. The "Documentation of Restraint/Isolation" document does detail staff "blocked" the Student from hitting certain windows, but both the Tier II behavior program teacher and paraeducator noted this blocking did not involve the physical intervention or force used to control a student. Rather, the staff members strategically placed their bodies in a position such that the Student could not hit a glass window with his hands. This then, would not represent a restraint under the IDEA.

During her interview with OSPI's investigator, though, the Tier II behavior program teacher stated the Student began to hit both herself and the paraeducator after the Student was blocked from hitting the window, and that, at this time, the Tier II behavior program teacher and the paraeducator each 'carried the Student under the arm – one on each side'⁸ into isolation room. The Tier II teacher also stated it was a 'two-person CPI escort.' The foregoing interaction does represent a restraint. And that restraint appears to have been justified, it would have been reasonable for the Tier II teacher and paraeducator to anticipate a risk of incurring physical harm, but, given the fact that the narrative portion of the November 2, 2023 "Documentation of Restraint/Isolation" form does not mention a restraint having been applied to the Student, it does not appear proper reporting procedures were followed.

In terms of the reporting and follow-up procedures, the Parent was informed via voicemail on two occasions in early November 2023, but if the Parent was informed of the contents of the narrative, the Parent would not have been informed of the administration of a restraint. Furthermore, according to the November 2, 2023 "Documentation of Restraint/Isolation", it does not appear the Parent was provided with written notification of the event until March 28, 2024, a date more than five business days after November 2, 2023. Accordingly, proper restraint reporting

⁸ Paraphrasing.

procedures were not followed, and this represents a violation of the IDEA. Certain staff will be required to attend training regarding the same.

February 27, 2024: According to the Tier II behavior program teacher, on February 27, 2024, a 'two-person CPI hold' was administered to the Student after the Student attacked his brother on the playground. Said circumstances would have repeated a reasonable likelihood of imminent harm, justifying administration of a restraint. And it appears the restraint was discontinued at the earliest moment that was reasonably safe—the February 27, 2024 "Documentation of Restraint/Isolation" document states the restraint only lasted one minute. Furthermore, it appears the Parent was timely notified of the same: Said document stated the Parent was informed of the isolation and restraint at 7:25 pm on February 27, 2024. And that "written notice [was] mailed home" on February 28, 2024. This represents proper restraint procedures; OSPI does not find a violation of the IDEA.

CORRECTIVE ACTIONS

By or before **May 31, 2024, June 7, 2024, June 28, 2024, September 13, 2024, November 18, 2024,** and **January 31, 2025**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP Meeting

By or before **June 7, 2024**, the Student's IEP team, including the Parent, will meet. At the meeting, the IEP team must address the following topics:

- The language for the annual IEP goals. The newly developed language will identify specific skillsets and include a measurement that would be clearly understandable to an individual without a special education certificate.
- An IEP that clearly states the actual SDI minutes to be provided to the Student.

By **June 7, 2024**, the District will provide OSPI with the following documentation: a) any relevant meeting invitations, b) a prior written notice, summarizing the IEP team's discussion and decisions; c) a list of people, including their roles, who attended the meeting; d) the IEP; and e) any other relevant documentation.

Compensatory Education

By or before **June 7, 2024**, the District and Parent will develop a schedule for a total of 75 hours of compensatory education, divided between social and behavior, as the IEP teams best sees fit.

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher or related service provider. Services may be provided in a 1:1 setting or a group setting, if appropriate. Services will be provided outside the District's school day and can be schedule on weekends, over District breaks, or before or after school. The compensatory services can be provided through a District summer program, if that program will provide specially

designed instruction in the Student's areas of service. The District will provide OSPI with documentation of the schedule for services by or before **June 7, 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 **January 31, 2025**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **September 13, 2024** and **November 18, 2024**, of the compensatory services provided to the Student at that point. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **January 31, 2025**, 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 **January 31, 2025**.

DISTRICT SPECIFIC:

Training

The District, in cooperation and collaboration with a non-District employee (e.g., the ESD or other trainer), will co-develop and jointly conduct a training on the below topics. The District will provide the trainer with a copy of this decision, SECC 24-42.

The following District staff will receive training: District special education administrators, and the following at the Student's school: principal, assistant principal, special education certified staff (teachers). The training will cover the following topics:

- That an IEP must be reviewed and revised whenever a change in need resulting from the student's disability warrants a change in services;
- That an IEP must accurately state the services to be provided to a student; and,
- Post-restraint reporting and follow-up requirements.

The training will include examples.

By or before **May 31, 2024**, the District will notify OSPI of the name of the trainer and provide documentation that the District has provided the trainer with a copy of this decision for use in preparing the training materials.

The training will also include post-training implementation activities for staff to demonstrate their learning and the District to support implementation. The District will propose the plan and OSPI will review and provide input. By way of example, the implementation support could include job-

embedded coaching, holding community/parent engagement meetings, additional trainings or development of a training series, exploring policy and procedure revision, development of a District monthly audit to ensure discipline is being properly tracked, etc. By or before **June 28, 2024**, the District will provide OSPI with the training plan and post-training activities for review, input, and approval.

OSPI will approve the materials or provide comments by July 5, 2024.

By **September 13, 2024**, the District will conduct the training regarding the topics raised in this complaint decision.

By **September 13, 2024**, the District will submit documentation that required staff participated in the training. This will include 1) a sign-in sheet from the training, and 2) a separate official human resources roster of all staff required to attend the training, so OSPI can verify that all required staff participated in the training.

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 22nd day of May, 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.)