

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 24-53

PROCEDURAL HISTORY

On April 17, 2024, 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 Evergreen 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 April 17, 2024, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on April 18, 2024. OSPI asked the District to respond to the allegations made in the complaint.

On April 18 and 19, 2024, the Parent provided OSPI with additional information. OSPI forwarded that information to the District on April 19, 2024.

On April 22, 2024, the Parent provided OSPI with additional information. OSPI forwarded that information to the District the same day.

On April 29, 2024, the Parent provided OSPI with additional information. OSPI forwarded that information to the District on May 7, 2024.

On May 3, 2024, OSPI received the District's response to the complaint and forwarded it to the Parent on the same day. OSPI invited the Parent to reply.

On May 6 and 7, 2024, the Parent provided OSPI with additional information. OSPI forwarded that information to the District on May 7 and 8, 2024.

On May 7, 2024, OSPI requested information from the District. The District provided OSPI with that additional information on May 15, 2024, and OSPI forwarded that information to the Parent on the same day.

On May 8 and 9, 2024, the Parent provided OSPI with additional information. OSPI forwarded that information to the District on May 9 and 10, 2024.

On May 8, 2024, the District provided OSPI with additional information. OSPI forwarded that information to the Parent on May 9, 2024.

On May 9, 2024, OSPI requested information from the District. The District provided OSPI with that additional information on May 9, 2024, and OSPI forwarded that information to the Parent the same day.

On May 10 and 16, 2024, the Parent provided OSPI with additional information. OSPI forwarded that information to the District on May 10, 11, and 17, 2024.

On May 20, 2024, OSPI requested information from the District. The District provided OSPI with that additional information on the same day, and OSPI forwarded that information to the Parent on the same day.

On May 20 and 23, 2024, the Parent provided OSPI with additional information. OSPI forwarded that information to the District on May 21 and 23, 2024.

On May 21 and 23, 2024, the District provided OSPI with additional information. OSPI forwarded that information to the Parent on the same days respectively.

On May 24, 2024, the Parent provided OSPI with additional information. OSPI forwarded that information to the District on the same day.

On May 24, 2024, the District provided OSPI with additional information. OSPI forwarded that information to the Parent on the same day.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on April 18, 2023. 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. Since April 18, 2023, per WAC 392-172A-02000, has the potential bullying of the Student prevented the Student from accessing a free appropriate public education (FAPE)?
2. Since April 18, 2023, per WAC 392-172A-05147, has the District determined whether the Student needed a functional behavioral assessment (FBA), or otherwise, has the District appropriately addressed concerns regarding the Student's behavior?

LEGAL STANDARDS

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 individualized education program (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 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. *Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013).

Behavior Intervention Plan (BIP): A BIP is incorporated into a student's IEP if determined necessary by the IEP team for the student to receive FAPE. The BIP, at a minimum, describes: the pattern of behavior(s) that impedes the student's learning or the learning of others; the instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team; the positive behavioral interventions and supports to reduce the pattern of behavior(s) that impedes the student's learning or the learning of others and increases the desired prosocial behaviors and ensure the consistency of the implementation of the positive behavioral interventions across the student's school-sponsored instruction or activities; and the skills that will be taught and monitored as alternatives to challenging behavior(s) for a specific pattern of behavior of the student. See WAC 392-172A-01031.

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

FINDINGS OF FACT

Background: 2022–23 School Year

1. The Student was a third grader at a District elementary school and was eligible for special education services under the other health impairments category.
2. On January 30, 2023, a functional behavioral assessment (FBA) was completed for the Student. The target behaviors were aggression, elopement, and refusal.

3. On February 21, 2023, the Student's IEP team met for an annual review of the Student's IEP. The Student's IEP provided specially designed instruction (SDI), delivered by the special education teacher in a special education setting, from February 24, 2023 until February 23, 2024, as follows:
- Behavior: 30 minutes/2 times weekly
 - Social Emotional Skills: 30 minutes/3 times weekly
 - Reading: 30 minutes/4 times weekly
 - Written Language: 30 minutes/4 times weekly
 - Math: 30 minutes/4 times weekly
 - Behavior: 75 minutes/5 times weekly (by a staff assistant in a general education)

The IEP also included the following related and services:

- Occupational Therapy: 60 minutes/1 time yearly (by occupational therapist)

The team also drafted a BIP for the Student.

A prior written notice (PWN), dated February 21, 2023, stated, in part:

...team reviewed the Educational Day at a Glance (EDG) document that was completed by [Student's] case manager and general education teacher...team updated [Student's] service grid...75min/day of behavior support was added in the general education setting...He does not require a 1:1 para in order to access his education.

The educational day at a glance stated that the parties agreed to assign the Student 1:1 adult supervision during morning, lunch, and afternoon recess.

April 18, 2023: Complaint Timeline Begins

4. On June 1, 2023, the principal emailed the Parent, stating in summary:
- During lunch recess, Student was chased by 4-5 peers.
 - Student was tripped by peer 1.
 - Adult supervision moved to assist Student. No injuries.
 - Adult supervision was at recess but wasn't right next to Student.
 - Principal held a restorative conversation for Student and peer 1.
 - Student and peer 1 agreed to stay 5 feet apart at recess.
 - Peer 1 was given consequences for chasing and tripping Student.
 - In the future, adult supervision will be close enough to hear conversations.

The principal also informed the Parent, "There was also an issue at Boys and Girls Club (BGC)¹ that was complex and partially related to what happened at school. I will let [BGC director] handle the investigation and resolution of that conflict."

5. On June 8, 2023, the parties held a meeting. The "Wraparound with Intensive Services" (WISe) clinician stated that the Student reported he was attacked at school and BGC after school. The parties agreed to the following:

¹ The Student's school hosts a Boys and Girls club after school program, although the program is not run by the District.

- Adult supervision does not have to be within arm's reach.
- Running is okay. No tag.
- Eyes and ears at all times.
- Team will frontload Student with playground expectations to ensure rules are clear.

6. On August 23, 2023, the Student's IEP team met. A PWN from the meeting stated:
 ...recess incident from June was reviewed. The parent asked for explicit and ongoing teaching and reminders of recess expectations. The team created the following notes for adult support at recess: No tag; Running is okay; Eyes and ears at all times.

The parent requested weekly communication via email to her and [Student's]...WISe team regarding celebrations and challenges.² Mom also requested the WISe team be informed when [Student] is in an escalation for an extended period of time as well as reported to the after school club during dismissal exchange. The WISe team would also like to be informed when [Student] has a hard last hour of the school day.

2023–24 School Year

7. On September 11, 2023, the District held its first day of instruction for the 2023–24 school year. The Student was a fourth grader in a District elementary school and the February 21, 2023 IEP was in effect.

8. On October 9, 2023, the Student's IEP team met and a PWN from that date stated, in part:
 Parent no longer believes [Student] needs a 1:1 para. Parent indicated she would like to focus on [Student] feeling safe/bullying/friendships at school. School team in agreement that [Student] is not currently demonstrating a need for a 1:1 para.³

Notes from the meeting stated the Parent was considering pulling the Student out of BGC after school program and homeschooling the Student.

9. On October 10, 2023, the Parent sent the principal an email that stated, in part, that three boys were actively bullying the Student at school and BGC.

10. On October 11, 2023, the principal sent the Parent an email that stated, in part:
 I connected with [BGC Director]...The boy that was involved in the incident doesn't go to [our school]...He is bused from another school...I did, however, meet with [Student] today to talk to him about his report of being bullied at school. He said that the [peer] who was a bystander is mean to him at club sometimes. He also said that he can be mean to him at school. He didn't have any examples of situations when he was mean but that he would sometimes say he doesn't want to play with him.

I talked to the other boy about his interactions with [Student]. He said they hardly see each other at school. He said [Student] plays with different friends than him and they rarely interact...They aren't in the same class, so they only see each other at recess.

² The case's record contains approximately 23 weekly progress reports the District provided the Parent.

³ The 1:1 paraeducator referenced here is different than the 1:1 adult supervision at recess.

[Teacher 1], let's ensure the para at recess is aware of [Student's] feelings about this student so she can keep a close eye on it. Also, I know there are plans for a collaborative problem-solving conversation with [Student], [BCBA], and someone from his team about being bullied at school. It would be great if we could get more details about how the boy is mean to [Student].

11. On February 16, 2024, the Student's IEP team met. At this meeting, the Student's FBA, IEP, and BIP were developed. The Student's IEP provided SDI, delivered by the special education teacher or paraeducator in a special education setting, from February 22, 2024 until February 21, 2025, as follows:

- Social Emotional Skills: 30 minutes/5 times weekly
- Reading: 30 minutes/4 times weekly
- Written Language: 30 minutes/4 times weekly
- Math: 30 minutes/4 times weekly
- Social Emotional Skills: 75 minutes/5 times weekly (by a staff assistant in a general education)

12. On March 6, 2024, the Parent emailed the District multiple times. The first email stated, in part:

I want to move forward with my plan...[Student] only being on campus for special ed classes and keep him on point with his grade but other than that I do not want him at any of the recesses until I can figure out how to have him removed from the school district.

The second email stated, in part:

...One of the provisions of his IEP is that [Student] is to have a chaperone during recess. He is also not allowed to play contact sports so much so he's not even allowed to play tag...on or around March 5. My son was allowed to play a game called demon slayer with a kid he is known to get into physical altercations with and a little girl. Right in front of his chaperone, he was slap boxing both of them and apparently turned into a physical altercation with the little girl who not only slapped my son, but also tried to bite him... the school has a plan of action that is on his IEP that says when he is in situations like this, they should call Wise to help intervene. He literally has counselors that have a 15 minute window to respond to Crisis, such as him fighting other children which has become almost a daily occurrence and they are not utilizing the Wise team...Second recess, same group of kids, same chaperone, same game of demon slayer they're all slapped boxing each other my son gets into another physical altercation with the same little girl. At this point my son runs away the little girl is following my son the chaperone falls. I'm not really sure how the fight gets broken up this time...why was his counselors not called during the first fistfight when he's had like three fist fights in the last two weeks??? Why was he allowed to play the same game that led to a physical altercation that he's not even supposed to be playing in the first place with somebody he's not even supposed to be playing with they both know this.

13. On March 7, 2024, the Parent emailed the District:

Why exactly was [Student] kept inside from his recess today? Would it not have been appropriate to keep him inside for the second recess after he got into a fistfight not just some random day. I never said do not ever send him to recess again I said if he gets into a fist at the first recess is probably not a great idea to send him to the second recess so

now we're just not letting him go to recess and telling him to go ask his mom why he's not allowed to go to recess.

The principal replied, "[Student] was kept in from recess per your request...yesterday."

14. On March 8, 2024, the Parent emailed the District, in part:

This meeting is to discuss how there is a full grown adult, who is "supervising" him getting into a slap boxing match twice with the same group of children at two different recesses, and how that is keeping him safe...You guys are to call Wise anytime he is in a physical altercation or he's been escalated for longer than 25 minutes. You guys have literally not one time ever appropriately followed his IEP and I want to know why.

The principal responded, in part:

We did call the Wise team when [Student] had his most recent fight. [They] were unavailable at the time...We call the Wise team when there are big situations at school and they usually are able to come support. However, they have other clients and obligations and sometimes are unable to drop everything and come.

A staff assistant at recess cannot prevent [Student] for [sic] all confrontation or conflict. [Student] makes his own choices at recess. The staff assistant reminds [Student] of the expectations, helps problem solve, observes, and intervenes at times. However, just like when he is working with any one of us, [Student] still makes his own choices and doesn't always follow the expectations.

15. On March 27, 2024, the Parent emailed the principal that the Student was bullied over a kimono he wore to school, and reprimanded by staff members when he tried to engage with them in casual conversation.

16. On March 28, 2024, the principal responded:

I talked to [Student] today regarding the two new incidents you mentioned...I asked him about his new kimono and the comments students made towards him. He said that one student who he didn't know walked by him and said, 'That's goofy.' Also a student from him class said it was cheap. He was able to identify the student from his class so we could address that comment. However, he was not sure who made the other comment. He also said a couple students told him they thought it was cool.

I [also] talked to the two adults...[Student] told me that he had already talked to [one of them] about it and he was fine and felt like the situation was resolved.

17. On April 12, 2024, the Parent emailed the District about a bullying incident by peer 2.

The principal responded:

...both [Student] and [peer 2] left early today and were gone before I heard about the issue. However, we were able to talk to the adults that were there during the conflicts today as well as some of the students who heard them...

...

The discussion between them continued at lunch and the para with [Student] intervened. Both boys were using inappropriate language with one another.

...

Since I haven't talked to the boys yet, I can't tell you if there is more to the story or not...I will continue the investigation on Monday...

18. On April 15, 2024, the parties met. A PWN from this date stated, in part:

Following a physical altercation at recess in early March which resulted in disciplinary action, [Student's] mother emailed district staff and expressed concerns with the level of supervision at recess as well as concerns with [Student's] IEP/BIP.

In response the District and parent scheduled an IEP meeting on 3/18/24. In an effort to get [Student] back into school as soon as possible, the District offered to hold a parent meeting...on 3/13/24 to discuss parent concerns for recess safety and hear parent goals for upcoming IEP meeting. [Student's] mother attended the meeting and [Student] returned to school the following day.

...The team reviewed purpose of the meeting but the discussion became unproductive and the team was unable to proceed with the agenda. The meeting was ended by district administration. No IEP changes were discussed, rejected or agreed upon.

Emails were sent to [Student's] mother on 3/19/24 and on 3/22/24 asking if she was interested in reconvening the IEP team to continue the discussion from the 3/18/24 meeting. No response was received.

...

The District does not have concerns with the content of [Student's] current IEP or [BIP]. The proposed IEP was in response to parent concerns alone.

19. On April 15, 2024, the principal emailed the Parent, in part:

Thank you for coming into the office to talk with [Student] and I about the findings from the investigation.

...

[P]roblem started with [peer 2] saying he didn't like [Student's] robot at the beginning of the day...Both boys admitted to saying mean things to each other...This was consistent with the stories told by the witnesses as well. The witnesses at lunch didn't know what caused the yelling at each other but did share that both boys were threatening to hurt each other and cussing...told them to stop as did the boys at the table.

...

I met with [Student] and [peer 2] and we had a restorative conversation. They both apologized...Both boys like each other at times and are mean to each other at times. They both agreed they would rather work on their friendship rather than taking space from each other.

20. On April 16, 2024, the Parent sent the following email to the District, "[Student] is getting bullied by the children at school specifically [peer 2 and three other students]."

21. On April 17, 2024, the Parent filed a complaint, which alleged, in part, "I would also like to address the issue of bullying, harassment and intimidation that is happening during recess in

front of his one on one supervising adult and during regular school hours leading to him not feeling safe with his peers and school staff.”⁴

22. An April 17, 2024 PWN stated, in part:

[District] is proposing to change [Student’s] IEP and [BIP].

...

On Friday 4/12/24 [Parent] emailed members of [Student’s] IEP team regarding concerns with bullying. [Parent] requested an IEP team meeting and the team met on 4/17/24 to review and update [Student’s] IEP and BIP.

...

[T]he following accommodations were added to the IEP:

- 1) Preferential seating/grouping with students not known to have a history of conflict w/ [Student]
- 2) Substitute staff will be made aware of known individuals to keep separate from [Student]

23. On April 18, 2024, the Parent sent an email to OSPI, stating, in part, as follows:

Today my son was taking a state test and this child walked over and began answering my son’s questions incorrectly. My son asked for help and the child was directed to leave my son alone and that the answers could not actually be corrected which upset him and caused him to not really care about the rest of the test. ... Shortly after this the same child began slapping my son on top of his head. He asked again for help from a teacher the teacher asked this child to leave my son alone and the child began calling him a loser in front of his peers as he walked away.

...

Because of the constant bullying and his teachers not putting in procedural safeguards or even taking into consideration the history of him and certain children, he is in a constant state of disregulation [sic] and therefore cannot get a fair chance at a good education!

24. On April 19, 2024, the Parent sent an email to OSPI, stating, in part:

Today the bullies (sic) desk was moved 3 additional feet from my son but there is no children between them so they haven’t actually been separated like we discussed in his IEP meeting Wednesday. Today my son was asked to please control his behavior and to be reading buddies with this exact child. My son was extremely uncomfortable and made it clear to his teacher who told him to work with this child and keep himself regulated. Eventually my son was able to convince [principal] to allow my son to call me who was adamant I needed to come pick him up from school. I asked him multiple times why and he said he did not want to stay in front of [principal]. When I came to pick him up he told me the reason why he wanted to leave is he feels unsafe, like the teachers are forcing him to interact with this child and that child was intimidating him and making him feel unsafe at school today and wanted to come home because the teachers were not respecting his request to no interact with the child who has a history of beating my son up making fun of him and gathering other child to harass and bully my son! We all agreed as an IEP team on Wednesday to separate the two of them. Since then this child has physically assaulted my son, humiliated him by calling him a loser in front of his peers and

⁴ Based on the Parent’s allegations related to behavior, OSPI included the second issue when it opened the present case.

interfered with my sons state test by being allowed to harass [Student] and press wrong answers on the key board causing my son to get a lower score and to become deregulated. Why is this being allowed? Why is my son still being forced to work as a pair with this child?

25. Also, on April 19, 2024, the principal emailed the Parent, in part, as follows:

I called you because [Student] wanted to talk to you. You didn't let me explain the purpose of my call. In the past you had requested that we don't call you during the day and that we call your WISE team instead. [Student] told me that you told him that isn't true and we are lying to him. I just wanted to confirm with you first that it is okay that he talk to you.

...

I asked [Student] why he wanted to go home and he said to play with his new go-cart and hoverboard. I asked him many times if anything happened today and he said no, he just wants to go home.

26. On April 20, 2024, the principal emailed the Parent, in part:

I wanted to follow up with you via email regarding what happened on Thursday with [peer 2]. First of all, I want to ease your mind that the testing they were doing on Thursday was only a practice test. The state test starts for 4th grade next week. [Teacher 2] reported that during the testing time [Student] was working hard on his test and finished pretty early. [Peer 2] was still working on his test. [Student] did go over to [peer 2] after he finished and asked him if he was done. [Teacher 2] reminded him that they need to stay away from each other. She did not see [peer 2] touch [Student's] computer nor did [Student] tell her that [peer 2] touched it.

I talked to [Student] and [peer 2] as well. [Student] reported that [peer 2] pressed an answer on his practice test and pushed next. [Student] said he told [teacher 2]. [Peer 2] reported that he did not push the button and didn't know what I was talking about.

The other report was that [peer 2] tapped [Student] on the head. Both boys reported this. They had the same story when I talked to them about this situation. [Student] was walking by and [peer 2] tapped him on the head. [Student] started pretend speedwalking towards him and said, 'Not cool, bro.' [Peer 2] was trying to be friendly, not trying to hurt him, and apologized to him right away on his own. When I asked [peer 2] why he tapped him on the head, he said he thought it would be funny - like a friendly thing to do. He thought they were both trying to be nice to each other and he thought it would be playful.

I talked to [peer 2] and reminded him that they need to stay apart. I also talked with him about always keeping his hands to himself even if he thinks the tap is friendly. He had already apologized. [Student] left early so we weren't able to have another conversation all together.

Just to note, the reason they are staying apart is because you have requested it. Both boys have expressed at different times that they would like to work on their friendship. Last time I talked to [Student], he said he kind of/ kind of not wants to be [peer 2's] friend, but it is whatever his mom decides. Although they have had conflict, the conflicts have come from both boys. When students struggle with peer relationships, it is hard if

we always say they have to stay away from each other. Peer conflict is typical at this age and our usual response would be to problem solve, make it right, and restore the relationship. We will honor your request to keep them separate the best we can. This can be challenging when they are in the same class, and they are drawn to one another.

[Teacher 2] did allow them to be reading buddies per their request. However, she sat with them and supervised the whole time. It is hard to keep them apart and they seem to want to work together. It went well according to both boys, but we will discontinue that in the future unless we hear otherwise from you.

27. On April 29, 2024, the Parent emailed OSPI and the District multiple times. The first email stated, in part:

Where were all the adults when [Student] got up to leave at lunch? [Student] has not eloped in a long time. ...This has become a pattern for the school to allow extremely unhealthy inappropriate behavior that happen and then blame My Son for his reaction. ...why are a bunch of kids standing around using the N-word in class doing non-educational Stuff hanging out in the corner having a conversation super unhealthy and inappropriate. [sic]

Another email stated, in part, that peer 2 was part of the incident in the cafeteria.

28. On April 29, 2024, the principal emailed the Parent:

I want to fill you in on the missing pieces with what happened with [Student] today. I know it is hard when you only hear [Student's] perspective, and it is important to hear all perspectives about what happened so you have the full picture.

During science [Student] was making noise during instruction and the teacher asked him to stop and gave many reminders...[Student] said he was having a hard time focusing and his brain wants to make noise...[Student] saw another small group playing a reading card game and he joined them instead...A girl in that small group went to teacher and said [Student] is taking over our game. [Student] noticed, left class, sat in the hall, and hit glass door with clipboard...

When [Student] arrived in [teacher 1's] room, he refused to sit for a three-minute break and began power struggling. He was hitting and kicking the glass doors of the classroom. [Teacher 1] called for behavior support. [Student] walked to the office on his own and asked to call his team. He called [WISe clinician] and talked to her at this time. He told her he was frustrated that the teacher keeps asking him to stop making noises. [WISe clinician] was able to help him regulate, and I walked him back up to [teacher 2's] room for small group.

The next incident happened at lunch. Each of the other boys at the table wrote what happened from their perspective and most of their stories were consistent with only a few details differing. All the boys in [Student's] class like to sit together at lunch. All was fine until a student said to a different boy (not [Student]), "What's up N-?" [Student] told him he can't say that word because he is Mexican, not Black. He disagreed with [Student]. [Student] said that he can say the N-word because his uncle is Black. Then [Student] said the N-word many times to a different boy at the table. [Student] then got up and walked out. His para followed him and called for help. I heard the call and saw [Student] walk out

the front door so I caught up to him. He said he wanted to walk home. He was frustrated because he thought the other kids don't care when someone else says the N-word but makes a big deal when he says it. We got to Home Choice before he agreed to turn around and call his team instead. A couple kids swinging on the swings at Home Choice asked him where he was going. He turned to them and flipped them off. We walked back and he talked to [WISe clinician]. [WISe clinician] decided to call you to see if you could pick him up.

When [Student] was in the office with me, we talked about saying the N-word. The N-word is an unacceptable word for anyone to say at school. I will have the same conversation with the other student.

When you arrived at the school [Student] saw you right away through the big windows in our office. I had several students in the office at the time and asked [Student] to wait inside until you came in to check him out. He disregarded my request and went out to meet you anyway. I watched through the window to make sure he was safe. Thank you for coming in and signing him out. It would be great if you would also remind him that he needs to wait for you to come inside before leaving.

29. On April 30, 2024, the Parent emailed the District and in part, asked why the WISe clinician was not being used to address the behavior incidents.

30. On May 3, 2024, the District submitted its response. Regarding the first issue, bullying, the District responded, in part:

The District denies the allegation that the potential bullying of the Student prevented the Student from accessing a free appropriate public education (FAPE). The District followed proper procedures for developing and implementing an IEP, based on the Student's unique needs to ensure FAPE, including scheduling IEP meetings at mutually agreeable times during the 22-23 and 23-24 school years between the District and parent. As evidence shows, the District convened multiple IEP meetings during the 22-23 and 23-24 school year to address parent concerns related to bullying, to discuss the student's behavior and where appropriate, make adjustments to the Student's IEP, so it continued to meet his unique needs. Additionally, as shown in the exhibits, the Building Principal investigated each of the Parent's allegations of bullying and sent the Parent, in writing, a summary of their investigation. As evidenced by the Student's IEP progress reports dated (6/15/23; 12/1/23; and 3/1/24) the Student was making sufficient progress toward their IEP goals. Further, the case manager's weekly progress reports demonstrate that the Student, overall, was making daily progress and is accessing their educational services. In summary, the District believes the Student's IEPs dated (2/21/23 and 2/16/24) and their subsequent implementation delivered the Student FAPE from April 18th, 2023 to April 18th, 2024.

Regarding the second issue, FBA, the District responded:

The District denies the allegation that it failed to appropriately address concerns regarding the Student's behavior. Two functional behavioral assessments (FBA) have been completed over the past year (1/30/23 and 2/16/24). The Student has a current Behavior Intervention Plan (BIP) dated (2/16/24 and revised 4/17/24) that aligns to his current target behaviors. The Student has had behavior intervention plans (BIP)

developed to align with his target behavior (2/21/23, 2/16/24). These plans have also been adjusted appropriately to address his behavioral needs (10/9/23, and 4/17/24).

31. On May 6, 2024, the Parent sent 10 emails to OSPI and the District. The emails reviewed many of the instances discussed above and alleged that the District was not following the Student's IEP and BIP.⁵
32. On May 7, 2024, the parties exchanged multiple emails on which OSPI was copied. The first emailed stated, in part, "I'm sitting here at lunch with my son and he informed me that [peer 2] slapped him in the head again today and [Student] was again why he responded so poorly to being hit."

In another email, the Parent stated, in part:

I found out today while having lunch with My Son that the children are grouped in lines of tables according to what class they're in. My Son happens to be in the class with said Child that cannot keep his hands off of My Son and her asses (*sic*) My Son while My Son is taking test encourages to come to our house and beat him up, unfortunately due to seating arrangement. There is a very limited amount of children that My Son can sit next to...The teacher say that My Son went to sit next to a group of children that did not want him to sit with them and refuse to leave. This sounds a lot like attempting to isolate My Son like what was happening most of last year and some of this year where if My Son is participating in a group sport and one of his known bullies joins the sport My Son is asked to stop playing and go do something else because he's not allowed to play with those children... [*sic*]

...

My Son is not just being bullied by the children. He is also being bullied by the staff members at the school. Let me give you another recent example of this. My Son was walking down the hallway and high-fives Child and was told by the assistant principal in front of all the rest of the children, please do not do that. You know that your mother is crazy like that. Between the constant minimizing of his feelings, such as telling him that his known bully who is not supposed to be near him, according to his BIP slapping him upside the head is a friendly gesture that he is overreacting to being bullied and isolated i'm surprised that My Son is doing as well as he is emotionally academically...[*sic*]

33. On May 9, 2024, the District emailed the Parent as follows:

I want to follow up with you regarding your email yesterday about [peer 2] hitting [Student] on the head.

...

When I talked to the boys they both had the same story. [Peer 2] was apologetic about touching his mask. We discussed how hard [peer 2] hit the mask. Both boys agreed it was a light touch, but still he should not have done it. I reviewed the expectations of keeping hands to self and staying away from [Student] with [peer 2].

⁵ One of the emails stated, in part, "This was the other child I had to press charges on for continually assaulting bullying and getting other kids to harass my son at school and them doing nothing about it." OSPI requested but has not received a copy of the police report from the Parent.

As I have mentioned before, it is challenging to keep [peer 2] and [Student] separate from one another. They are in the same class and seem to want to interact with one another. We will continue to remind them to stay apart.

...I want to remind you that if at any time you feel [Student] is being harassed, intimidated, or bullied, you can fill out a HIB form on the district website which would trigger a full investigation.

34. On May 9, 2024, the parties exchanged multiple emails on which OSPI was copied. The Parent's second email stated, in part:

So if according to [Student]'s IEP and BIP, he is supposed to have a one on one supervisor during unstructured events, such as lunchtime why is his known bully over there right next to him taking food off of his tray and causing My Son to become dis regulated [sic] and taking my sons food...If you were 10 years old and you were getting slapped in the back of the head every single day by your known bully and told that it's a friendly gesture, and this kid is now making it a point to every single day sit next to you and do stuff like say the N-word take food off of your tray, get other kids to make fun of you and just generally making sure that you can never have any peace of mind. I can't think of another word to describe that other than bullying in the school lack of one on one supervision or even calling these events what it is.

The principal replied, in part:

I want to provide some clarity on what happened at lunch today. First of all, I want to say how proud I was of how [Student] handled the situation. He was stressed about the situation before it was resolved and worked hard to stay regulated. He also problem solved and resolved the problem calmly. It was a success!

[Student] had set his tray at one of the tables and then left the table for a few minutes. When he returned, one of his meatballs was missing. [Peer 2] was walking nearby with a tray and [Student] thought [peer 2] had taken his meatball. He told [peer 2] he took his meatball. [Peer 2] said, 'Oh, sorry, bro, my bad.' [Student] thought he purposely took his meatball and ate it or threw it away. [Student] was really upset. His para asked the kitchen for more meatballs but they were out. The para was afraid [Student] was going to escalate so she came to get me.

I talked to [Student] about the incident. I asked him if he saw [peer 2] take the meatball and he said no. I asked all the kids and adults around if they saw what happened to the meatball and nobody saw anyone take the meatball. One of the boys at the table said that [peer 2] put his tray on the table to eat and then decided to move to eat outside in the courtyard. [Peer 2] picked up his tray and went out to the courtyard.

I talked to [peer 2] and he told me what happened. He took his tray (which looked identical to [Student]'s and sitting right next to it). The only difference was [peer 2] had already eaten one of his meatballs. He accidentally took the wrong tray. When [Student] told him he took his meatball, [peer 2] apologized because he realized he had taken the wrong tray.

We all talked about it together. [Student] apologized for assuming [peer 2] purposely stole his meatball. [Peer 2] apologized for accidentally taking his tray. They shook hands and were really friendly about the whole incident.

...

As far as the boys sitting by each other at lunch. [Student] wasn't at the table when [peer 2] put his tray down so he may not have realized [Student] was sitting right there. However, there are only three tables for each class and the boys tend to want to sit all together. There is a para there for [Student] and she supported him through this situation today.

Also, we made sure [Student] had enough food. He said he didn't need another meatball but would like an apple. So we got him another apple.

The Parent replied, in part:

I want this added to the formal investigation as well. As you can clearly see [principal] explains that [peer 2] picked My Son's tray up and walked outside and ate it and My Son was left to eat [peer 2]'s half eaten lunch. How is that a proper resolution...I wanna know which one of you would be OK with your child eating off of somebody else's eaten tray tray was purposely there for two reasons to humiliate you and cause you to get upset to prove that he can do whatever he wants to My Son! I'm very disturbed and disgusted my son was asked to eat that tray after the adults all knew it was had been in [peer 2's] hands and he had eaten off of it!

35. On May 10, 2024, the Parent emailed OSPI and the District multiple times with continued concerns about the meatball/lunch incident and shared concerns that the other student did this on purpose.

In one email, the Parent shared additional concerns about other students:

Son told me today that he was playing a game of goldfish with his teacher...and apparently this happens every Friday where the other children that are known bullies of My Son such as [peer 3 and peer 4] walk up interrupt My Son's game and say that they want to play and that My Son is being asked to walk away because he's not allowed to play with these children. That is very interesting to me considering a couple of facts, you can't seem to keep [peer 2] away from my son. Recently, [peer 2] was made to be My Son's reading partner in class. Also, recently, [peer 4] literally wrapped his fingers around My Son's throat and tried to choke him in that same IEP class. So why is he allowed to walk up interrupt My Son's game and make My Son get up and go do something up. I am so confused right now and really need some clarification as to what's going on.

36. On May 20, 2024, the Parent emailed the District and copied OSPI as follows regarding another incident:

In no way shape or form do me or [the Student's] counselors believe that [the Student] touched a kids butt. It's not [the Student's] behavior. He's actually very weird about stuff like that and get some incredibly uncomfortable, which is probably why he shoved the kid. I'm assuming that the kid was very loud about it and the [Student] got embarrassed. This is a perfect example of why My Son should not be at the school. Not only is his relationship completely covered with the adults so much so that he cannot even problem solve with them or hear them when they say that he's not actually in trouble and please just go back to class. Here is a perfect example of a recent incident that would lead My Son to not trust the adults that are working with him [Parent reiterated concerns about the lunch tray incident]...How about we just go off of known behaviors and history. This is

not something My Son does. And My Son is very adamant that one of the reasons why he was refusing to go back to class is that all of the adults in this situation kept telling My Son that they knew that he didn't just admit that he had done it...

The principal replied:

Thank you, [Parent], for coming to pick up [the Student] quickly today when [WISe clinician] contacted you. [The Student] was escalated and unsafe and neither [the WISe clinicians] were at work today. [WISe clinician] did return our call quickly (even though she was home sick) and attempted to talk to [the Student] via phone, but [the Student] ran out of the room and refused. I appreciate your prompt response in picking him up.

I want to give you the details about what happened today via email as you requested. [Student] was really dysregulated at lunch. He said he was mad at a student for accusing him of touching his bottom and he knows that he didn't. The other student was insistent, and [the Student] was as well. [Student] got frustrated and pushed him hard. [The Student] admitted to pushing him but was adamant that he didn't touch his bottom... Luckily, we were able to see this incident clearly on camera. [Student] was in the line to transition from recess to lunch. His para was standing right next to him. He clearly grabbed the other student's bottom twice.

...
[Student] wanted to see the camera footage so we allowed him to watch. When he saw that he had grabbed the student's bottom, he got more out of control. He slammed the office door, started screaming cuss words at the students in the health room, and was throwing things. It was an unsafe situation in the office...

37. The District provided the Student's progress reports as part of its response to the complaint.

The Student's progress notes⁶ for his IEP goals stated:

Social/Emotional Skills (restorative activities)

Date	Progress
3/17/23	Emerging Skill
6/15/23	Sufficient Progress
12/1/23	Sufficient Progress
3/22/24	Sufficient Progress

March 2023: IEP was recently reviewed.⁷

June 2023: [Student] is able to identify restorative activities 2/3 out of 5 trials. He has made the most growth in accepting that his actions have an affect on those around them and acknowledging possible emotions that his actions may elicit. His overall behavior has improved as well. [Student] maintained safe, responsible and respectful behaviors with an average of 88% in April, 83% in May and 85% in June.

December 2023: [Student] is able to identify restorative activities 3 out of 5 trials.

March 2024: 1 out of 5 trials.

⁶ The March 2024 progress notes are based on the February 2024 IEP goals.

⁷ OSPI notes all of the March 2023 comments stated the IEP was recently reviewed and are thus omitted for brevity.

Behavior (refusal)

Date	Progress
3/17/23	Emerging Skill
6/15/23	Sufficient Progress
12/1/23	Sufficient Progress
3/22/24	Sufficient Progress

June 2023: In May and June, [Student] had 3 documented instances of refusal to transition to break. This is a decrease from winter term. Each transition this term took at least 10 minutes. [Student] remained safe each time but needed wait time and adult support to transition to the special education room and de-escalate.

December 2023: [Student] demonstrates refusal for less than 5 minutes each situation on average, with around 1 situation per week that is longer than 5 minutes and requires adult support. [Student] currently has more than 2 situations per week.

March 2024: 1 out of 5 trials.

Math

Date	Progress
3/17/23	Emerging Skill
6/15/23	Sufficient Progress
12/1/23	Sufficient Progress
3/22/24	Sufficient Progress

June 2023: [Student] is able to answer addition and subtraction equations with regrouping with 63% accuracy.

December 2023: [Student] was able to answer equations with regrouping with 40% accuracy. He was able to demonstrate understanding of borrowing and carrying but made calculation errors. In probes from early November, [Student] was able to answer questions with regrouping with at least 80% accuracy. Absences this week may have affected performance.

March 2024: 2 digit by 1 digit at least 80% with adult instruction and support, using partial products/array.

Reading

Date	Progress
3/17/23	Emerging Skill
6/15/23	Sufficient Progress
12/1/23	Sufficient Progress
3/22/24	Sufficient Progress

June 2023: [Student] is able to write three sentences on topic when using speech-to-text. He continues to work on adding a concluding sentence. He needs reminders to edit and revise (punctuation, grammar).

December 2023: [Student] is able to write a four-sentence paragraph with a topic sentence and concluding sentence. He continues to work on editing his final draft for ending punctuation and correct spelling, even when provided technology tools.

March 2024: Less than 80% accuracy.

Written Language

Date	Progress
3/17/23	Emerging Skill
6/15/23	Sufficient Progress
12/1/23	Sufficient Progress
3/22/24	Sufficient Progress

June 2023: [Student] is able to read a beginning 3rd grade passage with at least 90% accuracy.

December 2023: [Student] is able to read a beginning 3rd grade passage with at least 90% accuracy.

March 2024: 4th grade level passage with 99% accuracy and 79% comprehension.

CONCLUSIONS

Issues One and Two: Bullying & FBA – Originally, OSPI opened the present complaint with two separate issues, but based on this investigation, these issues are inherently linked and will be addressed together. Regarding the first issue, the Parent’s complaint alleged, in part, “bullying, harassment and intimidation that is happening during recess in front of his one on one supervising adult and during regular school hours leading to him not feeling safe with his peers and school staff.” Based on this allegation, OSPI included the second issue as to whether the District has appropriately addressed concerns regarding the Student’s behavior.

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. 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.

Regarding the first issue, the District denied the allegation and responded, in part:

The District convened multiple IEP meetings during the 22-23 and 23-24 school year to address parent concerns...the Building Principal investigated each of the Parent’s allegations of bullying and sent the Parent, in writing, a summary of their investigation...the Student, overall, is making daily progress and is accessing their educational services.

A BIP is incorporated into a student’s IEP if determined necessary by the IEP team for the student to receive FAPE. The BIP, at a minimum, describes: the pattern of behavior(s) that impedes the student’s learning or the learning of others; the instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team; the positive behavioral interventions and supports to reduce the pattern of behavior(s) that impedes the student’s learning or the learning of others and increases the desired prosocial behaviors and ensure the consistency of the implementation of the positive behavioral interventions across the student’s school-sponsored instruction or activities; and the skills that

will be taught and monitored as alternatives to challenging behavior(s) for a specific pattern of behavior of the student. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.

Regarding the second issue, the District denied the allegation and responded, "Two functional behavioral assessments (FBA) have been completed over the past year...Student has a current Behavior Intervention Plan...that aligns to his current target behaviors."

In the present case, there was an FBA conducted in January 2023, and the District had an IEP and BIP in place that were dated February 21, 2023. The IEP included social emotional instruction, which meant the Student was receiving instruction addressing some of his behavior needs and the Student was making progress on his goals in this area. The Student's BIP was revised and updated on October 9, 2023. Then on February 16, 2024, another FBA was conducted and the Student's IEP and BIP were updated, and the BIP was updated on April 17, 2024. In addition, the District agreed to and provided additional adult supervision/support during unstructured times like recess.

This case's extensive email record also shows that the District has responded to and investigated the concerns the Parent has raised regarding the Student being bullied.⁸ For example, in one email, the principal stated, in part:

I want to provide some clarity on what happened at lunch today. First of all, I want to say how proud I was of how [Student] handled the situation. He was stressed about the situation before it was resolved and worked hard to stay regulated. He also problem solved and resolved the problem calmly. It was a success!

These incidents appear to be behaviors, occurring between peers, that are likely age appropriate. And while unfortunate that incidents occurred during which the Student felt uncomfortable, not only has the District followed up and investigated the incidents, the District has tried to work with the Student to work through the incidents. For example, the above email from the principal indicates the Student was learning how to work through these situations. The District also called the WISE clinician to assist for some of the incidents as the parties agreed, although that has not always been successful due to the WISE clinician's availability. Additionally, the Student and peer 2, while at times involved in conflict, also expressed an interest in working on their friendship. OSPI notes that when students struggle with peer relationships, it is hard for students to learn how to navigate conflict if adults say they have to stay away from each other. This can also be challenging when students are in the same class, and they are drawn to one another.

It is true that despite the adult supervision during recess, the Student has experienced some unfortunate incidents, but at a June 8, 2023 meeting, the parties agreed that the adult

⁸ Those investigations have even included incidents that have taken place at the after-school program not run by the District.

supervision used during recess did not have to be within arm's length. The parties may need to review that decision; although if the adult supervision is next to the Student every second of recess, or throughout the school day, this may significantly impact the Student's ability to socialize with his peers and to learn emotional regulation and problem-solving skills. While the Student had behavior supports in his IEP and BIP, if concerns continue, the IEP team should continue to discuss whether there are new or different ways to support the Student and his behavior needs. As for the Student's progress reports, they show that he is making both academic and social-emotional progress. Thus, although the District has not always perfectly implemented the agreements the parties have reached to completely avoid negative interactions between the Student and his peers, the District has not materially failed to implement the Student's IEPs and BIPs. For the reasons just provided, OSPI does not find a violation as to the present case's two issues.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this 7th day of June, 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.)