

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-103**

### **PROCEDURAL HISTORY**

On September 1, 2022, the Office of Superintendent of Public Instruction (OSPI) received 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, with regard to the Student's education.

On September 7, 2022, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On September 23, 2022, OSPI received the District's response to the complaint and forwarded it to Parent on the same day. OSPI invited the Parent to reply.

On September 26, 2022, OSPI requested that the Parent provide additional information, and the Parent provided the requested information on September 26, 2022. OSPI forwarded the information to the District on September 28, 2022.

On October 3, 2022, OSPI requested that the Parent provide additional information, and the Parent provided the requested information on October 4, 2022. OSPI forwarded the information to the District on October 6, 2022.

On October 6, 2022, OSPI received the Parent's reply. OSPI forwarded that reply to the District on October 7, 2022.

On October 10, 2022, the District provided additional information and this information was sent to the Parent on October 11, 2022.

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

### **SCOPE OF INVESTIGATION**

This decision references events that occurred prior to the investigation period, which began on September 2, 2021. 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. During the 2021-2022 school year, did District follow proper individual education program (IEP) development procedures to:
  - a. Ensure Parent's participation in IEP meetings in and around April 2022?
  - b. Respond to changes in Student's behavior based on Student's disability?

2. Did District address Parent's concerns regarding Student's progress on IEP goals?

### **LEGAL STANDARDS**

Parent Participation in IEP Meetings: The parents of a student eligible for special education services must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement and the provision of a free appropriate public education (FAPE) to the student. WAC 392-172A-05001. IEP teams must consider the parents' concerns and the information that parents provide regarding their child in developing and reviewing their child's IEP. 34 CFR §300.324; WAC 392-172A-03110(1)(b).

Parent participation 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. IDEA, 64 Fed. Reg. 12473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 5).

IEP Development for a Student with Behavioral Needs: In developing, reviewing, and revising each student's IEP, the team must consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior. 34 CFR §300.324(a)(2); WAC 392-172A-03110(2). This means that in most cases in which a student's behavior impedes his or her learning or that of others, and can be readily anticipated to be repetitive, proper development of the student's IEP will include positive behavioral interventions, strategies, and supports to address that behavior. IDEA, 64 Fed. Reg. 12,475, 12,479 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 38). A functional behavioral assessment (FBA) and behavioral intervention plan must be used proactively, if an IEP team determines that they would be appropriate for a child. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-1 and E-2).

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

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. In conducting its review of a student's IEP, the IEP team must consider any special factors unique to the student, such as: the use of positive behavioral interventions and supports for a student whose behavior continues to impede the student's learning; the language needs of a student with limited language proficiency; instruction in the use of Braille for a student who is blind or visually impaired; the communication and language needs of a student who is deaf or hard of hearing; or the student's assistive technology needs. 34 CFR §300.324; WAC 392-172A-03110. Part of the information the IEP team considers when reviewing and revising a student's IEP is the result of the most recent evaluation. When the student's service providers or parents believe that the IEP is no longer appropriate, the team must meet to determine whether additional data and a reevaluation are needed. 34 CFR §300.303; WAC 392-172A-03015.

### **FINDINGS OF FACT**

1. During the 2021–2022 school year, the Student attended a District high school and was eligible for special education services under the category autism.
2. The Student's April 2021 IEP was in effect at the beginning of the 2021-2022 school year. The IEP provided specially designed instruction and related services in:
  - Adaptive: 40 minutes/5 times per week (provided by a special education teacher, in a special education setting)
  - Math: 40 minutes/5 times per week (provided by a special education teacher, in a special education setting)
  - Reading: 30 minutes/5 times per week (provided by a special education teacher, in a special education setting)
  - Written Language: 25 minutes/5 times per week (provided by a special education teacher, in a special education setting)
  - Communication: 20 minutes/2 times per week (provided by a special education teacher, in a special education setting)
  - Social/Emotional Skills: 45 minutes/5 times per week (provided by a special education teacher, in a special education setting)
  - Adaptive: 40 minutes/5 times per week (provided by a special education teacher, in a general education setting)
  - Social/Emotional Skills: 45 minutes/5 times per week (provided by a special education teacher, in a general education setting)
3. On August 3, 2021, the District's secondary and transition program coordinator for special education (transition coordinator) emailed the Student's IEP case manager, stating that the Parent requested an IEP meeting prior to the start of the school year.
4. On August 18, 2021, the District held its first day of instruction for the 2021–2022 school year.
5. On September 1, 2021, the District's board-certified behavioral analyst (BCBA) conducted a formal observation of the Student.

6. On September 7, 2021, an IEP meeting was held. At this meeting, two private agency representatives, including the Student's private BCBA (community BCBA), attended as the Parent's invitees.

The Parent disagreed with the team that the Student had made social/emotional progress. On the prior written notice (PWN), it stated, "The IEP team will monitor [Student's]...data during the nine weeks returning to school for the 2021-22 school year to see if she can recoup skills from June 2021." Additionally, the District BCBA was going to work with the school team to find ways to address the Student's disruptive behavior.

7. On October 22, 2021, the Parent informed the District BCBA that the Student was having a difficult week.
8. On October 26, 2021, the District BCBA responded to the Parent's email that an IEP meeting was going to be scheduled.
9. From September through October of the 2021–2022 school year, the Parent and District were using the Student's notebook as a daily log to communicate about the Student's behavior and activities. The Parent and District stopped using the Student's notebook as a daily log when it became apparent that the Student was getting upset with some of the entries in the notebook.
10. In November 2021, the Parent and District began using "Google Docs" as a daily log to communicate about the Student's behavior and activities on a daily basis. The Google Docs log had entries from early November 2021 through early April 2022, and those entries covered each class period.
11. On December 16, 2021, the Student's IEP team met. Four private agency representatives, including the community BCBA, attended as the Parent's invitees. The Parent shared that there were behavioral struggles with the Student during the morning and middle of the day when the Student was at home. The Parent requested more support to ensure that all staff supporting the Student's behavior were adequately trained.

The IEP team introduced an "informal behavioral intervention plan" (BIP) at this meeting and amended the Student's IEP. Despite the IEP team calling this document an "informal behavior intervention plan", it fits the parameters of a BIP under WAC 392-172A-01031 and will be treated as such in this document.<sup>1</sup>

Under the BIP's first intervention strategy, it stated, "When Student exhibits low levels of behaviors (i.e. hyper mobile movements and say 'I don't want to,') staff will remind of earning choice time and her promise letter." The daily logs show that between November 8, 2021 and March 21, 2022, the words "promise letter" are mentioned 36 times. The Parent wrote to the staff 23 times that they should remind the Student about the promise letter if the Student

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<sup>1</sup> Whenever a district believes a student has behavioral needs and a plan is written to address those behavioral needs, all the requirements for a BIP that are laid out in WAC 392-172A-01031 must be met.

became agitated. During this time period, when the Student became agitated, staff reminded the Student 13 times about the promise letter.

The District BCBA expressed that all staff who interact with the Student would be trained and would have ongoing training to roleplay situations that would come up to gain more strategies. The community BCBA stated that the BIP that was shared with the IEP team was "great."

The Parent requested an additional emotional regulation goal for social/emotional, and to meet with the IEP team at benchmark dates to track progress. The Parent wanted the Student's social/emotional goal to focus on engaging in conversations with peers. The IEP team agreed to come up with an emotional regulation goal to discuss at the next IEP meeting. The IEP case manager was going to craft the goal and share it with the Parent prior to the meeting for input.

The IEP team also agreed to monitor the Student's progress/regression on her IEP goals following winter break and to conduct a file review regarding the previous social/emotional goal related to emotional regulation to determine whether the Student qualified for extended school year (ESY) services. The District also offered once-a-week recovery services for the Student. The Parent declined the recovery services offer because of the Student's afterschool schedule, and because the Parent was concerned about the Student's stamina.

12. In the December 16, 2021 IEP amendment, under the present levels section, it stated:

As a result of relationships and familiarity built with staff as well as more frequent communication with [Parent], [Student] has demonstrated growth in her ability to self-regulate. She has begun starting to ask for breaks independently and will occasionally, when she becomes agitated, choose a calming strategy when presented with cards prepared for her. Integration of a daily communication log with [Parent] has also shown significant improvement in some of the settings Student would become the most agitated (breakfast and lunch). Strategies [Parent] has shared that work for her at home have also helped significantly at school.

13. The Student's January/February 2022 progress report on her annual goals stated:

- Adaptive: Sufficient progress to meet benchmarks and goal (February 1, 2022)
- Social/Emotional (peer conversations): Progress made (January 14, 2021)
- Math: Insufficient progress to meet benchmarks and goals (February 1, 2022)
- Reading: Insufficient progress to meet benchmarks and goals (February 1, 2022)
- Written Language: Insufficient progress to meet benchmarks and goals (February 1, 2022)
- Communication: No update provided
- Social/Emotional (coping skills): No update provided

The progress report included the following comment for the social/emotional goal, "[Student] began demonstrating progress prior to winter break, but absences have begun to hinder her progress."

14. The Student was absent on January 3, 4, and 7, 2022. The Student was also absent on February 2, and 7–22 due to illness.

15. The Student's IEP team met again on February 22, 2022. Four private agency representatives, including the community BCBA, attended as the Parent's invitees.

The Parent requested that the Student be reevaluated. The IEP team documented in the PWN that it decided to wait on a reevaluation since the team was working on implementing the BIP and the previous evaluation was done only a year earlier. The IEP team used the following as the basis for taking this action: input of the Parent, Student, speech/language pathologist (SLP), physical therapist (PT), occupational therapist (OT), BCBA, teacher, and review of the Student's file, work samples, and data records.

The IEP team agreed to add training for staff to the BIP and considered possible recovery services for social/emotional for the summer.

The IEP team noted regression in the Student's self-regulation/coping skills down from 50% to 20% (seen after winter break), although the Student was able to recoup to 50% in one special education class, but was not to 50% in a different special education class by the beginning of February 2022.

16. On March 18, 2022, the daily log stated, "[Student] escalated and needed help calming for about 3 minutes during the period." Staff showed the Student her promise letter to calm the Student down.

17. The Student's March 2022 progress reports on her annual goals stated:

- Adaptive: Insufficient progress and not meeting benchmarks
- Social/Emotional (peer conversations): Insufficient progress, not meeting benchmarks
- Math: Insufficient progress and not meeting benchmarks
- Reading: Sufficient progress to meet benchmarks and goal
- Written Language: Sufficient progress to meet benchmarks and goal
- Communication: No update provided
- Social/Emotional (coping skills): Sufficient progress to meet benchmarks and goal

18. On March 28, 2022, the Parent was contacted about having an IEP meeting and responded that she needed to check with her team.

19. On March 30, 2022, the Parent emailed the District that she was available on April 19, 2022, for the Student's IEP meeting.

20. On March 31, 2022, the Parent emailed the District, asking if there was a date that worked for everyone. The District responded that April 18, 2022 was the best option.

21. On April 1, 2022, the Parent responded that April 18, 2022 did not work for her. The District responded that the special education teacher and IEP case manager would be following up regarding re-scheduling the April 18, 2022 meeting.

22. On April 12, 2022, the District PT emailed the Parent and asked the Parent if she would be able to attend an IEP meeting on the following Monday (April 18, 2022). The Parent then called the IEP case manager to cancel the meeting. The case manager refused to cancel the meeting because of a deadline. When the Parent asked for the meeting to be canceled again, the case manager said she had to check with the special education director. Later that day, the District's transition coordinator called the Parent, and the topics of this telephone call were memorialized in an April 15, 2022 email from the transition coordinator to the Parent.
23. On April 13, 2022, on the contact attempt report from the IEP meeting invitation, it stated that the Student was withdrawn from school to be homeschooled.
24. On April 15, 2022, the transition coordinator sent an email to the Parent about the April 12 phone call. The email mentioned the following:
  - The Parent expressed that she could not attend the April 18, 2022 IEP meeting and that the IEP meeting was being held without her.
  - The transition coordinator had met with the IEP case manager to discuss meaningful participation.
  - The District was surprised that the Student had withdrawn from school.
  - The District wanted to continue working with the Student and the family.
  - The District wanted to call the Parent on April 21, 2022, to check in with her. The special education teacher and IEP case manager were also scheduled to be on the call.
25. The Parent filed a special education community complaint on September 1, 2022, alleging the District:
  - Tried to prevent the Parent's participation in an IEP meeting;
  - Did not create a functional behavioral assessment (FBA) or safety plan for the Student;
  - Created a BIP only after multiple requests by Parent; and,
  - On multiple occasions, including March 18, 2022, did not follow the BIP.

## **CONCLUSIONS**

**Issue 1(a): Parent Participation in IEP Meetings** – The Parent alleged the District tried to prevent the Parent's participation in the April 2022 IEP meeting by scheduling the meeting on April 18, 2022. The Parent had previously informed the District that she was unavailable on April 18, 2022.

The parents of a student eligible for special education services must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement, and the provision of a free appropriate public education (FAPE) to the student. 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 this case, on April 1, 2022, the Parent informed the District that she was unavailable for an IEP meeting scheduled for April 18, 2022. Subsequently, the IEP case manager scheduled the meeting for April 18, 2022. When the Parent called the case manager about the meeting date, the case

manager at first refused to cancel the meeting, and when the Parent pressed the issue, the case manager responded that she had to check with the special education director before she would change the meeting. On April 12, 2022, the special education transition coordinator called the Parent to address the scheduling issue. On or around April 12, 2022, and prior to the meeting being rescheduled, the Parent withdrew the Student from school to homeschool the Student.

The transition coordinator called the Parent on April 12, 2022 and emailed the Parent on April 15, 2022. In both these instances, the transition coordinator addressed the issue of re-scheduling the IEP meeting to a date that worked for the Parent. It appears that the only reason that the meeting was not held after April 12, 2022, was because the Parent withdrew the Student from school on or about April 12, 2022.

Based on this case's facts, OSPI finds that the District's actions were not a violation for two reasons. First, the District's transition coordinator's April 15, 2022 email mentions trying to schedule the IEP meeting on a date other than April 18, 2022 that worked for the Parent. Second, the reason the meeting was not re-scheduled was because the Student was withdrawn from school, which made scheduling the meeting unnecessary. If and when the Student is reenrolled in the District, the Student's IEP team will likely need to meet, and the meeting should be scheduled at a mutually agreeable time and date.

**Issue 1(b): District Response to Changes in Student Behavior** – The Parent alleged that the District: 1) Never created a safety plan nor conducted an FBA for the Student; 2) Created the Student's BIP only after the multiple requests by the Parent, even though the Student was struggling behaviorally, and this affected her safety, wellbeing, and academics; and 3) The school violated special education requirements by not following the BIP on multiple occasions, and an example of this occurred on March 18th, 2022.

In most cases in which a student's behavior impedes his or her learning or that of others, and can be readily anticipated to be repetitive, proper development of the student's IEP will include positive behavioral interventions, strategies, and supports to address that behavior. An FBA and BIP must be used proactively, if an IEP team determines that they would be appropriate for a child.

Regarding the Parent's first allegation that a safety plan and an FBA were not created, at the IEP team's second meeting of the year, the District's BCBA provided the team with a BIP. The BIP included both prevention and intervention strategies for dealing with the Student's behavioral challenges. The District's BCBA also shared that all staff who interacted with the Student would be trained on how to deal with the Student. The Student's private BCBA remarked that this report was great. The documentation also indicates, as discussed further below, that the BIP was implemented following its development.

At the third IEP meeting, the Parent mentioned that she wanted the Student to be reevaluated. The IEP team documented in the PWN that it decided to wait on reevaluation since the team was working through the BIP at the time and the previous evaluation was done only a year earlier. In reaching its decision, the IEP team considered input from the Parent, Student, SLP, PT, OT, BCBA, and teacher, and reviewed the Student's file, work samples, and data. Although the Parent may



not have agreed with the IEP team's decision regarding the reevaluation, the decision was reasonable under the circumstances. While an IEP team should work toward consensus, the district has ultimate responsibility to ensure that the IEP includes the services that the student needs in order to receive FAPE. No one team member has "veto power" over individual IEP provisions or the right to dictate a particular educational program.

Regarding the Parent's second allegation, in early August 2021, the Parent asked for an IEP meeting before the beginning of the school year.<sup>2</sup> On September 7, 2021, the IEP team met for the first time during the 2021–2022 school year. Prior to this meeting, the District's BCBA conducted an observation of the Student. On December 16, 2021, the IEP team met for the second time. It is also at this second meeting that the BIP was introduced. Documentation provided shows that two IEP meetings had been held by the fourth month of the 2021–2022 school year, and at one of these meetings, a BIP was introduced. Based on these facts, it does not appear that the Parent had to make multiple requests before the BIP was created, and the District's actions were responsive to the Parent's concerns about the Student's behaviors.

Regarding the Parent's third allegation, the Parent expressed concern that the BIP was not being followed and an example of this occurred on March 18, 2022. Based on a thorough review of the record, especially the daily log entries after the BIP was first introduced on December 16, 2021, it appears that the District implemented the interventions and prevention strategies outlined in the BIP on a regular basis. The daily log does detail that the Student had struggles with her behavior on a regular basis, and the daily log also shows that with the help of District staff, the Student was able to generally keep her behavior under control without drastic escalation.

The Parent points to March 18, 2022 as an example of the Student's BIP not being followed. On that day, the daily log showed that the Student was agitated only during her third period and that this agitation lasted three minutes because the staff reminded the Student of what she needed to do to calm down, such as looking at her promise letter. A strategy about which the Parent wrote often in the daily log that the Student should be reminded of, and a strategy which the daily log indicated District staff frequently used.

Thus, for the reasons stated above, OSPI finds that the District reasonably responded to the Student's behaviors and OSPI finds no violation for this issue.

**Issue 2: District Response to Parent's Concerns about Student Progress** – The Parent alleged that the Student's behavioral struggles affected the Student's academic progress and the Parent's concerns were ignored, despite the Parent's multiple requests for intervention.

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.

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<sup>2</sup> OSPI notes the Special Education Community Complaint process can only investigate instances that occurred within one year of the present complaint. In the present case, that would be September 2, 2021. Any facts prior to September 2, 2021 were included to give context to the facts after September 2, 2021.

In the present case, progress reports were provided for two time periods during the 2021–2022 school year (January/February and late March 2022). These two progress reports show that the Student’s progress was inconsistent. Regarding the Student’s adaptive goal, the Student was making progress until February, but by late March, she was making insufficient progress. For the social/emotional peer conversation goal, the Student made progress until January 2022, but by March 2022, she was making insufficient progress. In reading and writing, the Student was not making progress at the time of the first progress report, but by late March 2022, she was making progress in these goals. As for math, in the two progress reports, the Student was marked as making insufficient progress to achieve her annual goals. As for the communication goal, no update was provided for the entire year.

Based on these facts, it appears that the Student experienced varied progress throughout the year on her goals. There are many reasons why a student’s progress may be inconsistent. For example, this Student missed a significant amount of school in February 2022, due to illness. It is very likely the Student’s absences impacted her progress, especially as reported on the March 2022 progress report.

In the present case, we know that the parties: (1) had three IEP meetings to address the Student’s behavior challenges and behavior related needs; and (2) were communicating daily through a log on Google Docs in which information was entered on a class-by-class basis. These two things indicate that the District was monitoring and paying close attention to the Student’s progress. Thus, based on these facts, OSPI finds no violation.

### **CORRECTIVE ACTION**

**STUDENT SPECIFIC:**

None.

**DISTRICT SPECIFIC:**

None.

Dated this 27th day of October, 2022

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.)