

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 18-103**

### **PROCEDURAL HISTORY**

On October 31, 2018, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Lake Stevens 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 November 1, 2018, 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 November 30, 2018, OSPI received the District's response to the complaint and forwarded it to the Parent on December 3, 2018. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On December 11, 2018, OSPI received the Parent's reply. OSPI forwarded that reply to the District on December 12, 2018.

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

### **ISSUES**

1. Did the District implement the Student's individualized education program (IEP), specifically the behavioral accommodations in the Student's IEP regarding the incident occurring on September 24, 2018?
2. Was the Student's IEP implemented by a certified special education teacher during the 2018-2019 school year?

### **LEGAL STANDARDS**

When investigating an alleged violation, OSPI must identify the legal standard that the District is required to follow and determine whether the District met the legal standard, and if the District made its decision in light of the student's unique abilities and needs. OSPI reviews the documentation received from a complainant and district to determine whether there is sufficient evidence to support a violation. If there was a violation, there will be corrective action to correct the violation and maintain compliance.

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction who is eligible to receive special education services. 34 CFR § 300.323(a); WAC 392-172A-03105(1). The district must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105.

Behavioral Intervention Plan (BIP): A behavioral intervention plan is a plan incorporated into a student's individualized education program (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 (effective January 29, 2016).

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.

Staff Training and Qualifications: School district personnel who direct or support the provision of special education and related services must be qualified to work in their particular capacities as required by state rule. All special education teachers providing, designing, supervising, monitoring, or evaluating the provision of special education must possess "substantial professional training." "Substantial professional training" will be evidenced by issuance of an appropriate special education endorsement on an individual teaching certificate issued by OSPI. Paraprofessional staff and aides must present evidence of skills and knowledge necessary to meet the needs of the students eligible for special education, and must be under the supervision of a certificated teacher with a special education endorsement or a certificated educational staff associate. School district personnel who direct or support the provision of special education and related services must hold the credentials, certificates, endorsements, or permits that are required by the State Board of Education for the position in which they are employed. As a general rule, a teacher who is hired to provide special education services must hold an individual teaching certificate with a special education endorsement. General education certificated teachers who deliver specially designed instruction must be supported by a certificated special education teacher responsible to monitor and evaluate the student's progress toward the annual IEP goals. 34 CFR §300.156; WAC 392-172A-02090.

Certificated/Classified Staff Training: A school district must ensure that certificated staff who deliver special education and related services to a student eligible for special education are appropriately and adequately trained to do so. 34 CFR §300.156(a); WAC 392-172A-02090(1). Classified staff must have the skills and knowledge necessary to meet the needs of students with disabilities and must be supervised by appropriate certificated staff. A school district must also

ensure that classified staff members receive training to meet state recommended core competencies. 34 CFR §300.156; WAC 392-172A-02090(1)(f) and (1)(g). Only when a parent can demonstrate that a teacher or service provider lacks the training and experience needed to provide a particular service will the parent have a viable claim for denial of FAPE.

## FINDINGS OF FACT

This decision references events which occurred prior to the investigation time period, which began on November 1, 2017. These references are included to add context to the issue under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation time period.

### 2017-2018 School Year

1. During the 2017-2018 school, the Student attended a District middle school and was eligible for special education under the category of autism.
2. On October 25, 2017, the Student's individualized education program (IEP) team, including the Parent, met and developed the Student's annual IEP. The Student's October 2017 IEP (from October 25, 2017 to October 24, 2018) noted that the Student "sometimes struggles with impulse control, trouble viewing situations from other perspectives, and limited tolerance for the behaviors of others...[Student's] diagnoses increase his struggle to perform within a general education setting." The IEP included annual goals in the areas of reading, math, behavior, social/emotional, motor, written expression, and communication skills and provided for the following specially designed instruction in the structured learning center (SLC):
  - Occupational Therapy: 30 minutes, 3 days per week (occupational therapist)
  - Communication: 30 minutes, 3 days per week (speech-language pathologist)
  - Behavior: 40 minutes, 5 days per week (special education teacher-paraprofessional)
  - Adaptive/Self-help: 30 minutes, 5 days per week (special education teacher-paraprofessional)
  - Social/Emotional: 70 minutes, 5 days per week (special education teacher-paraprofessional)
  - Reading Comprehension: 53 minutes, 5 days per week (special education teacher-paraprofessional)
  - Written Expression: 53 minutes, 5 days per week (special education teacher-paraprofessional)
  - Math Problem Solving: 30 minutes, 5 days per week (special education teacher-paraprofessional)
  - Math Calculation: 23 minutes, 5 days per week (special education teacher-paraprofessional)

The Student's IEP included 36 accommodations in the areas of presentation, response, timing/scheduling, testing, and behavior, and included a behavior plan/contract as an accommodation. Supports for staff included "Right Response" training for staff.

The team also reviewed the results of the functional behavioral assessment (FBA), dated October 25, 2017. The FBA addressed the Student's behavior involving elopement, physical aggression, and verbal aggression and recommended a behavior intervention plan. The FBA, in part, stated:

From the start of the current school year until the present date, [Student] has demonstrated behaviors that have resulted in the use of Emergency Response Protocols on 3 occasions. He has demonstrated lesser behaviors that have resulted in use of Reset/Time Out, such as struggles with impulse control, blurting out, disrupting the learning environment of others or name-calling. [Student] struggles with showing tolerance for others, often lashing out verbally by either name-calling, shouting directions or directly repeating direction recently given by an adult, or stating that he needs a break and walking into the designated break space...It was also previously reported that [Student] had engaged in aggressive behavior on several occasions, usually beginning with a verbal altercation that escalated toward physical aggression towards others, both peers and adults.

Based on the FBA, the Student's IEP also had a behavioral intervention plan (BIP), dated October 25, 2017, and an emergency response protocol (ERP). The Student's ERP stated that restraint and isolation could be used when the Student "demonstrates behaviors that pose an imminent likelihood of serious harm. Such behaviors may include physical aggression towards others (i.e., hitting, kicking, slapping, throwing objects at others with the intent to harm." The ERP stated, "...The student will be released from isolation or restraint as soon as the likelihood of serious harm has dissipated. The maximum duration of the isolation or restraint will not exceed 5 minutes, so long as the likelihood of imminent harm has sufficiently dissipated."

The Student's BIP addressed verbal aggression and stated, in relevant part:

- "From the start of the current school year until the present date, [Student] has demonstrated behaviors that have resulted in use of Emergency Response Protocols on 3 occasions...His previous special education teacher reported in the previous FBA (functional behavioral assessment) that [Student] left the classroom 5-6 times per day without asking for permission...It was also previously reported that [Student] had engaged in aggressive behaviors on several occasions, usually beginning with a verbal altercation that escalated toward physical aggression towards others, both peers and adults."
  - Description of Target Behavior – "[Student] often engages in verbal aggression, such as calling others names, barking orders at others even if they have just been given a redirection from an adult, or threatening to hurt others."
  - Antecedent Strategies – "Positive behavior plan with reinforcements; specific positive feedback; help with transitions."
  - Response Plan – "Allow break in separate designated space; teach safe spaces for student to when overwhelmed; ERP if needed."
3. As part of the SLC program the Student attended, the program had a "reset" space in an adjacent classroom where students could either be directed to by staff or choose to go to for a break. According to the District, the Student frequently chose to use the reset space. In addition, the "quiet room" could be used for situations requiring isolation of a student. The District collected data on the use of the quiet room using a "[school] SLC-RESET" form. The form included whether the "quiet room" was needed, did the student need an escort to the quiet room, and how many adults intervened.
  4. During the 2017-2018 school year, the Student had nine incidents, which resulted in isolation, and two incidents that resulted in restraint.

5. On June 14, 2018, the Student received a four-day suspension for a behavior incident that involved threatening other students with a butter knife and displaying physical aggression towards students and staff. On the same day, the District completed a "Building Threat Assessment." The assessment indicated that the Student exhibited a high risk of escalation, possibly including substantial violence.
6. Throughout the school year, the District systematically collected data on the Student's behavior. According to the Student's special education progress reports (dated January 26 and June 15, 2018), the Student generally made progress in both academics and behavior, although the Student struggled with consistency. The June 2018 progress report regarding the Student's social/emotional behavior goal stated:

[Student's] weekly averages for this goal fluctuates from as low as 1.8 to as high as 4. Similarly to his Behavior goal, [Student] continues to struggle with interacting positively and respectfully with others. He becomes increasingly agitated with others' unexpected behaviors. At times, he is content to call them out for their behavior and tell them what they should be doing instead. More often than not, he calls others names or is quick to insult others, and has become verbally and physically aggressive on a number of occasions. He has also taken to spending more time alone or working one-on-one with an available adult, in a separate room. [Student] can be highly changeable in his moods, which can make it difficult for staff to determine how best to support him in a given moment. There have been a number of times during which [Student] interacts very well with his peers, playing and engaging in great social interactions, but these moments are not as frequent or long-lasting as we would hope to see. This continues to an appropriate goal to work on.

### **2018-2019 School Year**

7. On September 5, 2018, the District's 2018-2019 school year began. The Student continued to be eligible for special education services and his October 2017 IEP and BIP remained in place.
8. At the start of the school year, according to the District, the District was unable to hire a certified special education teacher for the SLC classroom despite numerous attempts. Because the District was unable to hire a certified special education teacher, the District placed a "certificated substitute teacher" in the SLC who was not a certified special education teacher. In response to the complaint, the District provided a description of how services were provided to the Student:

The substitute teacher was overseen by [special education teacher 1], who in addition to being a certified and endorsed special education teacher, has significant expertise in Student's identified disability, autism, and who provided direct instruction to Student this fall. Further, Student's IEP was case managed by [special education teacher 2], another certified and endorsed special education teacher.

According to the District, during the first two weeks of school, the District's autism/behavior specialist worked directly with the Student and also assisted the substitute teacher with planning and scheduling classes.

9. On September 24, 2018, according to accounts from the counselor, assistant principal, and autism/behavior specialist, the Student became agitated and his behavior escalated despite staff attempts to intervene with the Student by talking with the Student in a separate space. The assistant principal provided the following account, in part:

...I received a call over the radio to come to the SLC room, I arrived around 1:35 PM to find [Student], [behavior support specialist] and Student's one-on-one support person [paraeducator] all sitting in the work room. [Behavior support specialist] had been called to the classroom because [Student's] behavior had escalated to the point of yelling and making threats. When I entered I observed all three sitting in different areas of the room, [Student] was sitting in the glider style chair rocking back and forth and yelling different comments. [Paraeducator] then communicated with me that he and [Student] had been having a great day and then for an unknown reason his behavior changed and he had become very agitated. He said [Student] was getting more and more agitated and it was very evident that de-escalation techniques were not working...On other occasions when [Student] had been in an escalated state I have been able to talk with [Student] to help him de-escalate, I made one attempt with no success as it seemed to agitate even more...

According to the accounts, the Student stated, in part:

- "I am going to kill everyone at this school and all of my classmates."
- "I will kill everyone on earth. I want to be the only one alive. It will be genocide."
- "I will slit your throats."
- "I am going to \*\*\*\*\* hurt and kill everyone I know even at home, school and in the world."
- "My classmates deserve to die. They are \*\*\*\*\* annoying."
- "I am not playing video games anymore so I can have more time to think...I am figuring out ways and searching for ways to cause the most damage to everyone at school."
- You will all regret \*\*\*\*\* pissing me off."

The staff's accounts also stated that the District called the Parent to inform her of the incident and the Parent came to school and removed the Student from school. The staff informed the Parent about the Student's stated threat towards home.

The Parent alleged that the District failed to recognize the Student's signs of agitation and follow the normal procedure of offering the Student a safe place to regain his composure, which had worked in the past, and provided specific positive feedback. The Parent stated, "...I can find no evidence in the district's response that they provided him with a menu of options, used the ERP, provided positive feedback, allowed him to de-escalate, or let him have a break in a designated safe space. He was in the designated break room, but he was with four men who were verbally harassing him. This does not qualify as a safe space." The Parent asserted that by not following the behavior procedure, the staff inadvertently escalated the Student's behavior and the Student began to make threats, which precipitated his suspension.

10. On September 25, 2018, the District sent the Parent a letter, stating the Student received an "emergency expulsion" based on "[Student] making multiple threats to harm peers, staff, and parents. [Student] was also making racial comments directed at a staff members."
11. On September 26, 2018, the District conducted a risk assessment. The "District Level Assessment Summary" stated, in relevant part, that the Student had demonstrated a "more

serious threat of violence” by “threatening to kill classmates.” According to the assessment, the risk of escalation, including substantial violence, was rated an eight out of a possible ten on the risk scale.

On the same day, the “Student Threat Assessment Team” met to discuss the results of the threat assessment. The team included the following participants:

- School safety, security, and health specialist
- Assistant principal
- Mental health support specialists
- School resource officer
- Counselor
- Autism/Behavior specialist
- Assistant superintendent
- Superintendent
- Executive director of special services

According to the meeting notes, the team discussed the Student’s history of verbal and physical aggression, and history of sending rude and threatening emails. The team recommended reevaluation, providing services with combination of a teacher and online education, and reconvening the IEP team.

12. On September 27, 2018, the District held a meeting with the assistant principal, autism/behavior specialist, special education teacher, school psychologist, and the Parent.

According to the meeting notes, the following, in part, was discussed:

- “Unsafe to be at school; emergency expelled due to incident on 9/24.”
- “Based on conversation with his therapist and with mother and father; determined [online program] would be best program for him; Start date October 22<sup>nd</sup>.”
- “Not blaming anyone; thanked [special education teacher] for all the work she’s done with him last year.”
- “First three weeks went well.”
- “Over the summer, started medication.”
- “District offered reevaluation; father declined.”
- “Interim services starting new week-2 hrs. 2 days a week.”

13. According to the District, as a result of the September 27, 2018 meeting, the District rescinded the Student’s suspension.

14. On September 28, 2018, the District provided the Parent with a prior written notice, proposing to provide the Student’s special education services in an alternative setting until the Student enrolled in the online program. The notice stated:

[Student] has a history of school behaviors that include verbal and physical abuse towards students and staff, as well as threats of a calculated nature to do mass harm. These behaviors have changed in intensity with [Student] communicating his investment of personal time and energy into carrying through with these threats. [Student’s] parents report him to be kind, calm, and passive at home and the team determined that a traditional school setting, at this time, could possibly be triggering these thoughts and behaviors.

[Student's] parents have taken action to enroll him in [online program] with a start date of 10/22/18.

15. According to the District's documentation, services were provided to the Student on the following days at "an alternative location": October 1; October 3; October 5; and October 8, 2018.
16. On October 22, 2018, the Parent withdrew the Student from the District and enrolled him in an online program run by a different district in Washington.
17. On October 31, 2018, the Parent filed this complaint.

## **CONCLUSIONS**

**Implementing behavioral accommodations** – The complaint stated that the District failed to follow the Student's individualized education program (IEP), including providing the behavioral accommodations and implementing the BIP, when the incident occurred on September 24, 2018.

At the beginning of each school year, a district must have an IEP in effect for every student eligible to receive special education services. A district is required to implement a student's IEP as written, including the general accommodations and any behavior accommodations, including a BIP.

Here, the Student had behaviors that manifested in physical and verbal aggression, and elopement. The Student's IEP provided a behavior plan/contract as an accommodation. The Student's BIP provided a response plan for what staff should do if the behavior occurred. The response plan provided the following options: "Allow break in separate designated space; teach safe spaces for student to go to when overwhelmed; ERP if needed." The Parent also signed an emergency response protocol (ERP), which allowed the District to use restraint or isolation if necessary when there was danger of imminent harm. Beyond this, the Student's BIP did not have a prescribed sequence of steps to follow in the event of an incident where the Student's behaviors escalated.

On September 24, 2018, the Student became increasingly agitated despite staff attempts to de-escalate the Student's behavior by talking with him. At some point, the Student began to make explicit verbal threats towards other students, staff, and home. Staff stayed with the Student in the break room until the Parent arrived to pick up the Student to go home. The Parent alleged that the Student was "verbally harassed" by staff while in the designated break room and therefore, it did not constitute a safe space that should have been provided.

According to the documentation, the staff attempted to de-escalate the Student by first taking him in the break room (his designated space to take breaks) and then talking with the Student in an attempt to de-escalate him. Talking with the Student was necessary to provide specific positive feedback, which was part of the BIP to reinforce appropriate behavior. According to the documentation, the Student had previous incidents where he made threats to other students and staff. Staff had previously de-escalated the Student by talking with him. In this particular situation, the Parent seems to suggest that the District should not have attempted to talk to the Student to



de-escalate him; however, being silent only aggravated the Student further. While the Parent alleged that the staff being in the room with the Student made the space "unsafe," there is no evidence that staff verbally harassed the Student. The staff appear to have followed the same procedure they had used during past behavior incidents, and used practices consistent with the Student's BIP.

The BIP also provided for the use of isolation or restraint. The Parent stated that there was no evidence that the District used the ERP. However, a district should not use an ERP, restraint, or isolation unless warranted by the situation. Here, the District was justified in not implementing the ERP protocol because the threats and verbal aggression did not constitute an imminent likelihood of harm. Although staff were sufficiently concerned about the Student's threats, which included the family, that they warned the Parent when she arrived at school. Based on the documentation, the staff took steps to de-escalate the Student that were consistent with the Student's BIP. Therefore, there was insufficient evidence to substantiate that the District did not follow the Student's BIP or IEP accommodations. No violation is found.

**Certified Special Education Teacher** – The complaint alleged that the District failed to provide the Student with a certified special education teacher during the 2018-2019 school year. The complaint stated, "...[school] was supposed to provide a supported classroom with a SPED-certified teacher. Having SPED-certified teachers somewhere within a five mile radius of his classroom does not meet the need for a SPED certified teacher in the classroom full-time."

Special education and related services must be provided by appropriately qualified staff. A general education teacher or paraeducator may assist in the provision of special education, provided that the instruction is designed and supervised by a certified special education teacher, including monitoring progress. In the case of a student's IEP that states the provider of special education services is a special education teacher, the IEP must be implemented as written.

Here, the Student's October 2017 IEP provided for the following special education services, all in the special education classroom: behavior; adaptive/self-help skills; social-emotional; reading comprehension; written expression; math problem solving; and math calculation. For these areas, the IEP stated that the "service provider delivering service" was the special education teacher and paraeducator. The District stated it was unable to find a certified special education teacher for the classroom so a substitute teacher with no special education certification was assigned to the SLC. However, the District provided a certified special education teacher to "oversee" the substitute teacher and provide the Student with direct instruction. In addition, a second certified special education teacher was assigned to the Student as his case manager. The autism/behavior specialist also assisted in the Student's classroom and provided direct services to the Student.

According to the documentation, the Student's instruction was provided by a combination of special education teacher 1, the paraeducator, the autism/behavior specialist, and the substitute teacher, all under the supervision of special education teacher 1. The Student's IEP required that a special education teacher *or* paraeducator provide the specially designed instruction. The Student received instruction from a special education teacher and a paraeducator as called for in his IEP. The fact that he also received instruction from a substitute teacher and an autism/behavior

specialist, under the direction of a special education teacher, does not mean the Student's IEP was incorrectly implemented. No violation is found.

### **CORRECTIVE ACTION**

**STUDENT SPECIFIC:**

None

**DISTRICT SPECIFIC:**

None

Dated this \_\_\_\_ day of December, 2018

Glenna Gallo, M.S., M.B.A.  
Assistant Superintendent  
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.)