

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-147**

### **PROCEDURAL HISTORY**

On December 1, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parents (Parents) of a student (Student) attending the Lake Washington School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On December 2, 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 December 8, 2022, the Parents provided additional information, which raised an additional issue. The same day, OSPI notified the Parent and District that an additional issue was added to the complaint for investigation and asked the District to respond.

Between December 7 and 13, 2022, OSPI received additional information and documentation from the Parents. OSPI forwarded the additional information to the District on December 14, 2022.

On December 15 and 16, 2022, OSPI received additional information and documentation from the Parents. OSPI forwarded the additional information to the District on December 19, 2022.

On December 19, 2022, OSPI received the District's response to the complaint and forwarded it to the Parents on December 20, 2022. OSPI invited the Parents to reply.

On December 21, 2022, OSPI received the Parents' reply. OSPI forwarded that reply to the District the same day.

On December 23, 2022, OSPI received additional information from the Parents. OSPI forwarded the additional information to the District on December 23, 2022.

On December 29, 2022 and January 8, 2023, OSPI received additional information from the Parents. OSPI forwarded the additional information to the District on January 9, 2023.

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

### **ISSUES**

1. Whether the District addressed the Parents' requests to amend the Student's individualized education program (IEP) and change the Student's placement, including responding to the Parents' requests for IEP meetings in August through November 2022?

2. Whether the District addressed the Parents' request for a reevaluation and/or inappropriately conducted a functional behavioral assessment (FBA) instead of a full reevaluation during the 2022–2023 school year?
3. Whether, if the FBA was necessary, the District timely conducted the FBA during the 2022–2023 school year?
4. Whether the District implemented the Student's IEP during the 2022–2023 school year?
5. Did the District ensure parent participation in any IEP meetings during the 2022–2023 school year?

## **LEGAL STANDARDS**

IEP Development: When developing each child's individualized education program (IEP), the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child. 34 CFR §300.324(a). WAC 392-172A-03110.

Parent Request for IEP Meeting: When a parent or district believes that a required component of a student's IEP should be changed and requests an IEP meeting, the district must conduct an IEP meeting if it believes that the change may be necessary to ensure the provision of FAPE. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,476 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 20). The District must schedule the meeting at a mutually agreeable time and place, and appropriately invite the parent to the meeting. 34 CFR §§300.322 and 300.328; WAC 392-172A-03100. If a parent requests an IEP meeting because the parent believes that a change is needed in the provision of FAPE to the student or the educational placement of the student, and the school district refuses to convene an IEP meeting because no change is necessary for the provision of FAPE, the district must provide written notice to the parents of the refusal, including an explanation of why the district has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student. IDEA (Appendix A to 34 CFR Part 300, Question 20).

Reevaluation Procedures: A school district must ensure that a reevaluation of each student eligible for special education is conducted when the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student warrant a reevaluation, or if the parent or teacher requests a reevaluation. A reevaluation may not occur more than once a year, unless the parent and school district agree otherwise, and must occur at least once every three years, unless the parent and school district agree that a reevaluation is unnecessary. 34 CFR §300.303; WAC 392-172A-03015. When a district determines that a student should be reevaluated, it must provide prior written notice to the student's parents that describe all of the evaluation procedures that the district intends to conduct. 34 CFR §300.304; WAC 392-172A-03020.

Functional Behavioral Assessment (FBA): An FBA focuses on identifying the function or purpose behind a child's behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly

helpful to the IEP team in developing a behavioral intervention plan (BIP) that will reduce or eliminate the misbehavior. For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP team has decided that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child's disability, the IEP team must include a BIP in the child's IEP to address the behavioral needs of the child. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-2). The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP, which includes behavioral intervention services and modifications that are designed to address behavior. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. As with other evaluations, to conduct an FBA, the district must obtain the parents' consent and complete the FBA within thirty-five (35) school days after the district received consent. 34 CFR §300.303; WAC 392-172A-03015. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-4). Once the need for a reevaluation is identified, a district must act "without undue delay and within a reasonable period of time;" and the U.S. Department of Education, Office of Special Education Programs (OSEP) has indicated that waiting several months to seek consent is generally not reasonable. *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008). The IDEA does not specify who is qualified to conduct an FBA, for example there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

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. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. 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 [student with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Parent Participation in IEP Meetings: A school district must ensure that one or both of the parents of a student eligible for special education are present at each IEP team meeting or are afforded the opportunity to participate, including: (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place. The school district must take whatever action is necessary to ensure

that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. 34 CFR §300.322; WAC 392-172A-03100.

Parental participation in the IEP and educational placement process is central to the IDEA's goal of protecting the rights of students with disabilities and providing each student with a FAPE. The regulatory framework of the IDEA places an affirmative duty on agencies to include parents in the IEP process. Most importantly, a meeting may only be conducted without a parent if, "the public agency is unable to convince the parents they should attend." When a public agency is faced with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA, in this case parental participation and timely annual review of the IEP, the Supreme Court and the 9<sup>th</sup> Circuit have both repeatedly stressed the vital importance of parental participation in the IEP creation process. Delays in meeting IEP deadlines do not deny a student FAPE where they do not deprive the student of any educational benefit. *Doug C. v. State of Hawaii*, 61 IDELR 91 (9th Cir. 2013); *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072, 1078 (9th Cir. 2003); *Amanda J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001).

## **FINDINGS OF FACT**

### **Background and Parents' Complaint**

1. Prior to the 2022–2023 school year, the Student was homeschooled and then attended school in a different Washington school district beginning in November 2021. The Student was enrolled in an alternative learning experience (ALE) program in the other district.

The Student was found eligible for special education services in April 2022 and an individualized education program (IEP) was developed. The District noted that in reviewing the Student's initial evaluation, it "drew in large part on existing data from a private evaluation of Student obtained by Parents in winter 2021." The Student was found eligible for special education services under the category multiple disabilities, and the evaluation noted the Student had diagnoses of autism, generalized anxiety disorder, and separation anxiety disorder. The evaluation report recommended the Student receive specially designed instruction in behavior and social emotional.

2. In their complaint and reply to the District's response, the Parents alleged the District:
  - Failed to follow procedures for reevaluations, functional behavioral assessments (FBAs), and behavioral intervention plans (BIPs). This included creating a BIP prior to completing an FBA, improperly conducting an FBA instead of a reevaluation, and not getting Parent input.
  - "Required" an FBA and that the resulting FBA report was inaccurate and inappropriate.
  - Failed to respond to requests for an IEP meeting and to update the Student's IEP to change services, supports, accommodations, modifications, and the Student's placement.
  - Failed to implement the services in the IEP.
3. On August 2, 2022, the Student's Mother spoke with the District's director of special services (director). According to the Parents' complaint, they spoke about enrolling the Student in a program similar to the program the Student attended in the previous district, and ensuring

that appropriate services, accommodations, and supports were in place. An August 2, 2022 email from the director to the Parents indicated the director stated she would review the evaluation and IEP from the previous district and was available to answer questions about services and supports available in the District and at the middle school.

Notes from the phone call indicated the Parent shared that the Student had anxiety and struggled to engage in school. The director shared information about the continuum of services in the District, including the "Intervention Classroom [IC] (students with soc/emo/behavior/mental health needs-therapeutic component)." The Parent shared she was concerned about a large environment for the Student and was interested in the IC program. The director noted she shared that the team would need to consider and determine if an evaluation was needed or an FBA.

According to the Parents' complaint, during this conversation, the director stated that an FBA would be "required" as part of this process. The Student's Mother expressed concern about the placement and reiterated concerns in an email.

4. On August 3, 2022, the Parents emailed the District that they were considering their options but leaning toward enrolling in the District. The Student's Mother stated she was "a little worried about the stress of having to start at [middle school]." Later, on August 8, 2022, the Parent stated in an email to the District that they would be enrolling in the District middle school.
5. On August 15, 2022, the director emailed the Parents, in response to emails from the Parents, regarding registering at the middle school. The director stated that staff started on August 29, 2022 and she would connect the Parents with the school psychologist who would process the transfer. The director stated, "I will be meeting with the [middle school special education] teachers next Wednesday and will provide them the information regarding [Student's] enrollment as well" and that "we will get a meeting scheduled before school starts to discuss services and schedule."
6. According to their complaint, the Parents interpreted the director's email as stating the IEP team should meet prior to the start of the school year.
7. An August 29, 2022 email from the Student's case manager indicated there was a middle school "schedule meeting" scheduled for August 31, 2022.
8. Also, on August 29, 2022, the school psychologist at the Student's District neighborhood school conducted the transfer review process for the Student's enrollment in the District. The school psychologist reviewed the initial evaluation and IEP from the previous district, accepted the evaluation, and proposed providing comparable services to those provided in the previous district IEP.

The prior written notice identified the Student's middle school case manager and indicated that an IEP meeting may need to be convened if the Student's IEP needed to be modified or amended.

9. On August 29, 2022, the Student's Mother emailed the school psychologist and asked if they could "chat this week in order to ensure that everything is in place for a smooth start next week." The Parent also stated they expected the "accommodations needed for a mainstream school to be significantly different" than the previous district IEP.
10. On August 30, 2022, the case manager emailed that she would take the Parents' concerns and questions "about schedule, placement, and testing" to the IEP team. The case manager stated they would need to hold an IEP meeting and that she would "reach out to [sic] tomorrow afternoon to schedule a time."

Subsequent emails between the case manager and Parents indicated they discussed availability.

11. On August 31, 2022, the case manager stated she reached out to the special education teacher about a "meet and greet" on September 1, 2022 in the afternoon and noted she had not yet had "a chance to speak to admin or counselors about finding a safe space in the office."

The Student's Mother responded that they would be there for the meet and greet.

12. On September 2, 2022, the Parents emailed the case manager, noting concerns that the middle school building "poses challenges in regard to anxiety and overwhelm" and that it would be difficult for the Student to navigate. The Student's Mother asked if the Student could come a few minutes early to navigate the halls before they were crowded with students, and the case manager responded that, that would be fine.
13. On September 5, 2022, the Student's Mother emailed the case manager, stating they were "not confident there is enough support in place to set up a positive experience for [Student] attending...[middle school]." The Student's Mother stated, "without an appropriately supported environment in place, it's not wise to start [Student] in class on Tuesday. An overwhelming experience on their first day (or first week) of school is likely to trigger school avoidance and worse." The email stated, "we are requesting an IEP meeting prior to starting school so we can thoroughly plan for the supports [Student] needs." The Student's Mother stated they were not willing to send the Student to a "mainstream classroom" without appropriate supports.

### **2022–2023 School Year**

14. On September 6, 2022, the District's 2022–2023 school year began.
15. At the start of the 2022–2023 school year, the Student continued to be eligible for special education services and the May 2022 IEP, adopted from the previous district, was in effect.

The May 2022 IEP included goals in social emotional and behavior, and 60 minutes a week of specially designed instruction in the special education setting and 30 minutes of specially designed instruction in the general education setting. The IEP indicated the Student would spend 96.4% of the day in the general education setting and the Student did not have a behavioral intervention plan (BIP).

16. The Student did not attend the first week of school.
17. Regarding implementation of the IEP, the Parents stated the IEP included 90 minutes of special education services per week and alleged the District only provided 30 minutes per week or no special education services during "holiday, 'Leap' weeks, and assembly weeks."
18. On September 8, 2022, an IEP meeting was schedule for September 14, 2022.
19. On September 14, 2022, the Student's IEP team met.

According to the District's response and prior written notice, the IEP team agreed, based on Parent input regarding the Student's stress in larger settings, to start the Student with a modified schedule in the middle school. The team agreed the Student would attend only a small group for social/emotional instruction on Friday mornings from 9:55–10:25 am and a daily math class in a smaller setting (10:30–11:20 Monday, Tuesday, Thursday, Friday, and 9:25–9:55 am Wednesday).

Meeting notes and the prior written notice indicated the Parents shared concerns about the Student's need for social support, and that the Student is often reactive and impulsive. The Parents shared that the Student has not "been able to engage with traditional schools." The Parents stated the Student needs 1:1 assistance in group situations and transitions, and needs to be in a smaller, less stimulating environment.

The team also proposed initiating a functional behavioral assessment (FBA) to gather additional data on how to address the Student's stress in larger instructional settings as reported by the Parents and to inform the development of a BIP. The prior written notice also indicated the team considered having a co-taught science class as part of the Student's schedule, but rejected that because the team "determined that at this time [Student] need [sic] support in a small group setting...to limit stress induced anxiety caused by a crowd."

The meeting notes indicated the school psychologist explained the FBA process and how "FBA data will help the school team in determining appropriate supports." The director shared that the team could not place the Student in a significantly more restrictive placement without "gathering any data to determine if such a placement is appropriate or not." The school psychologist proposed sending the Parents the consent form to initiate an FBA, once the Student began attending school on the modified schedule.

20. According to the Parents' complaint, at the September 14, 2022 meeting, they asked why an FBA was required and expressed disagreement with conducting an FBA and disagreement that

“observational data” would be needed based on an “environment that did not accommodate our child’s disability.” The Parents stated they offered a home visit for observation and that the District declined. The Parents stated that they also stated that if an FBA was required, that it start immediately. The Parent stated that none of their questions or objections were noted in a prior written notice, and that the prior written notice inaccurately documented that the team “agreed” to initiate an FBA as the Parents disagreed with the FBA. Thus, they argued the prior written notice was inadequate.<sup>1</sup>

The Parents stated in their complaint that during this IEP meeting, they also requested changes to the Student’s accommodations, supports, modifications, and placement. The Parents stated that none of their requests were “appropriately documented” in a prior written notice.

Further, in their reply to the District’s response, the Parents stated they did not truly agree with the modified schedule and that instead, the District “informed” them that the Student would start with the modified schedule and they “only complied with [this] because they were told that this was ‘required’ by the FBA.”

21. Based on emails between the case manager and Parents September 16 through 22, 2022, the case manager shared the Student’s schedule, shared documentation from the IEP meeting (prior written notice and procedural safeguards), and worked to help support the Student’s introduction to the new schedule. These supports included planning to have someone meet the Student and walk the Student to class, planning timing to avoid the halls being crowded, starting the day after the Student was told the plan, and finding a safe place for the Student to take a break, and call home if needed.
22. On September 20, 2022, the Student came to school. According to emails, it was “not the start we hoped for” and the case manager proposed meeting with the Student to go over the plan, explaining the gradual start, what students are working on, and expectations and boundaries prior to the Student trying again. The Parents responded that it was not successful because the Student did not have time to “feel safe in [the] space before demands” were put on her. The Parent stated “demands” were as simple as, “‘this is a math class, so we’re going to do math’...‘sit over here’...‘stay in the classroom.’” The Parents stated that the Student reported that the “environment at [middle school was] overwhelming and [the Student] doesn’t feel safe going back there.”
23. According to the Parents’ complaint, the emails the Student’s Mother sent on September 18, 19, 21, and 22, 2022 were requests for additional or changed accommodations, supports, modifications, and placement for the Student.

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<sup>1</sup> During the investigation, the Parents also detailed numerous other disagreements with the language of this and subsequent prior written notices, including, in part, that “continuing” an IEP was neither a proposed or refused action, that the notices lacked “**sources** for Parents to contact to obtain assistance” (emphasis in original); and that notices were not written in “language understandable to the general public.”

For example, in the September 22, 2022 email, the Parents expressed concern about how long it was taking to get the Student in school, stated the middle school was not an appropriate location for the Student, and stated that the Student did not feel "safe going back to that campus after feeling overwhelmed to the point of running." The Parents stated the Student needed "greater accommodations" and a "different school environment."

24. The District noted the Student, following this, did not consistently attend the middle school, even on a modified schedule.
25. On October 5, 2022, the Student's IEP team met to review the Student's modified schedule and discuss the FBA process.

The District stated the Parents shared concerns that the middle school was too stressful for the Student, who had not previously been to a comprehensive school setting. The team agreed to support a "phased introduction to [middle school] by focusing on the Friday social/emotional group, have Student's teachers meet with [the Student] remotely and build report, and provide Student with additional adult support and a break space." The team further discussed "that the FBA was a necessary step to developing an appropriate [BIP] to support Student's needs."

The prior written notice documented the Student starting with only instruction on Friday and indicated the team agreed that an FBA should be initiated to develop a BIP. The notice indicated the "[Student] currently struggles with great anxiety (large crowds, not feeling safe) about coming to [middle school]."

The prior written notice documented team discussion of the FBA and the goal to have the Student in school in some capacity. The Parents expressed concern about the environment being too stressful, the middle school causing anxiety, and the fact that the Student needs "to have [a] sense of agency that she can leave when needed." The notice indicated the "Parents expressed frustration with the duration of the process" and that the team explained it needed to follow guidelines in order to determine placement. The team agreed to have the Student meet teachers via Teams prior to coming to school and to have space for the Student to work 1:1 with a paraeducator in a conference room to ease into joining class.

26. According to the Parents' complaint, they continued to disagree with conducting an FBA, but stated they asked why the FBA had not yet begun if it was required. According to the Parents, the school psychologist stated they delayed starting the FBA because they "hoped that [Student] would have adjusted to [the middle school] by now." The Parent stated that none of their questions or objections were noted in a prior written notice. The Parents stated that delaying the FBA was denying the Student access to school. The Parent stated that none of their questions or objections were noted in a prior written notice.
27. Also, on October 5, 2022, the District sent the Parents a consent form for the FBA.

28. Later, on October 5, 2022, the Student's Mother emailed the case manager, special education teacher, and school psychologist following the IEP meeting. The email indicated the plan was to have the Student do a "walk-through tomorrow to prepare for going to the social group class on Friday."

Further emails indicate there was some miscommunication about the walk through. The Student's Mother responded that a walk through was needed and what they had "presented to [Student] this morning" and that the Student "NEEDS to practice in a safe and supported environment in order to know what to do in real-time." (Emphasis in original.) The case manager responded and provided times she could meet with the Student to show her the classroom, determine where she could take a break, and noted that there would be several adults at the social group on Friday that could assist the Student.

29. On October 6, 2022, the District received the Parents' signed consent form for the FBA.

The Parents stated in their complaint that while they signed consent, they did not agree with conducting an FBA and stated they were coerced into the process.

30. Also, on October 6, 2022, the Student's Mother emailed the District, following the "walk through" with the Student, and the Parent stated, "As you saw, [Student] was very stressed and approaching a full-blown panic attack. The good news is that even though it didn't look like it in the moment, she felt supported by the people around her."

31. In their complaint, the Parents stated the District required the Student to participate in activities that the Parents had "warned ahead of time were likely to result in panic attacks and adverse stress responses because the environment was not sufficiently accommodated, and the activities did in fact result in panic attacks." The Parents referenced the Parents' October 6, 2022 email as an example.

32. On October 7 and 14, 2022, the Student attended and participated in the Friday small group social/emotional instruction. The District provided detailed notes about the social group sessions and general information about the social group:

This is a small group of students with social skills needs...This group was originally scheduled to be every other week, but was increased to every week in order to accommodate [Student's] services...speech pathologist, was present on 10/7. 1:1 paraprofessionals/BTs for other students in the group were also present as needed for those students' IEP support. In the 30 minute group, students practiced social skills like conversations and games. Skills reinforced included, but were not limited to, flexibility, conversation skills, regulation and perspective taking. Skills are taught organically by providing social opportunities and then providing praise and feedback as needed to support application of appropriate social skills in the social scenario. Team has sent emails reminding parents of Friday social group, but [the Student] has not attended beyond these two sessions.

According to the progress reports and summarized in the District's response, the Student had "variable strengths in the skills targeted in the...IEP goals."

33. Also, on October 7, 2022, the school psychologist emailed the Parents a questionnaire to fill out for the FBA.
34. On October 9, 2022, the Student's Mother emailed the District, stating the Student "seemed to have a really positive experience with school on Friday and is eager to go again." The Parent further stated, "since we seem to have landed on a class setting that works, I wanted to touch base about the plan for moving forward with the assessment."

Subsequent emails discussed the possibility of the Student working with a 1:1 paraeducator for an additional class period, but that they would need to discuss a plan. The Student's Mother shared that their "current goals in entering school are primarily around social/emotional and behavioral factors as a pre-requisite for academic participation" and shared information around the Student's need for a non-online based curriculum as technology presented challenges.

35. On October 11, 2022, the associate principal emailed the Parents to reiterate the plan— Student attending the social group on Friday—and stated they wanted the Student "to stay for math," either in a math class or working "one-on-one with a paraprofessional in [special education teacher's] classroom." The associate principal noted the math curriculum was online and the Student would have support in accessing the curriculum.
36. On October 12 and 14, 2022, the Student's Parents emailed, requesting additional or changed accommodations, supports, and modifications for the Student, and stating that not providing appropriate services and an appropriate placement was resulting in harm to the Student.
37. On October 14, 2022, the Student stayed after her social emotional group for 10 minutes to complete a benchmark/placement test for math.
38. Later, on October 14, 2022, the Student's Father emailed the school psychologist that the Student's experience with taking the math placement test was "more than just a 'non preferred task'", it was "panic."
39. On October 16, 2022, the Parents emailed the case manager and noted the District was not following the Student's current IEP as follows and stated, "Please immediately begin providing a full 60 minutes of special education services, every week, without exception."
40. On October 18 and 25, 2022, the Student's Father emailed the District's executive director of special education, asking what the legal basis for an FBA was and stating that a placement at the middle school was not appropriate for the Student. The Parents requested a transfer to another school within the District "more appropriate to her needs." The Parents also expressed concerns with the length of time the process was taking.

The Parents stated in their complaint that "no policy rationale for the FBA 'requirement' was provided."

41. On October 25, 2022, the Student's IEP team met.

The prior written notice documented that the meeting was to clarify the Parents' questions around the FBA process and to consider the Parents' request for a significant change in placement for the Student. The District stated it proposed expediting the FBA, but declined to change the Student's placement. The District instead proposed to increase the Student's weekly specially designed instruction to daily specially designed instruction pending the completion of the FBA.

The prior written notice documented:

- Parent concerns that the FBA process as taking too long. The District proposed expediting the timeline, offering a feedback meeting on November 22, 2022.
- The Parents requested an IEP amendment to "indicate 2 hours per day of special education service in social/emotional learning, not to include any academic instruction." The notice indicated the IEP would be amended after completion of the FBA and that in the interim, the team offered 60 minutes per day of social/emotional/behavior instruction to be delivered by a paraeducator, along with the 30-minute Friday social group. The notice further indicated that development of a BIP and any other IEP amendments to minutes or services would be informed by the FBA.

The prior written notice also indicated that the social group was going well when the Student attended and that the Student "participates in games...and generally demonstrates appropriate social/peer interaction."

42. According to the Parents' complaint, they continued to disagree with conducting an FBA and concern about the delay and asked why no one had given them an explanation for why an FBA was required. The Parents stated in their complaint that during this IEP meeting, they also requested changes to the Student's accommodations, support, modifications, and placement. The Parents stated that none of their requests were "appropriately documented" in a prior written notice.

43. On October 25 and 28, 2022, the Student's Father emailed the District's executive director of special education, asking what the legal basis for an FBA was and expressing "dissatisfaction that the IEP process was not being followed." The Parent also requested an IEP meeting.

The Parents continued to report that the Student was unable to come to the middle school.

44. Also, on October 28, 2022, the Parents emailed the case manager, stating the Student would not be attending school due to anxiety and that this was "an exacerbation as a result of the last two weeks, where she experienced panic in the math assessment and then last week wanted to go but nothing was offered to her."

45. On October 28, 2022, the director emailed the Parents, stating the team would "move the completion time of the FBA up by 5 days" and could meet on November 22, 2022; and that the District would provide 60 minutes per day of social/emotional/behavior instruction as an interim offer, in addition to the Friday social group.

46. On October 30, 2022, the director emailed the Parents that they would schedule an IEP meeting and clarified that the FBA feedback meeting was scheduled for November 22, 2022.

47. On November 4, 2022, the Parents emailed that the Student would not be attending school because despite being "eager to go to school in general," the Student did not feel supported, and her anxiety was too great.

The District stated following this, the case manager "nonetheless continued to email the family with reminders for the available opportunities for Student at [middle school]."

48. On November 7, 2022, the school psychologist and District behavioral health services clinical specialist observed the Student at home for the FBA.

49. On November 14, 2022, the Student's Father emailed the director, stating there had been no response to his request for an IEP meeting or response to a request for information about the FBA process.

The director responded, referencing an email from October 28, 2022, where she previously stated, "the development of the BIP and IEP conversation would follow the completion and presentation of the FBA." The director stated they would send a draft of the FBA and BIP in the next few days and would consult with the team about scheduling an IEP meeting.

The Parents responded to the director, stating they did not agree to delay "the requested IEP meeting until after the FBA [although] it appears we have no choice."

50. On November 17, 2022, the director emailed the Parents a copy of the draft FBA and BIP and proposed the IEP team convene again, following the FBA results meeting on November 30 or December 2, 2022.

Following this, the Parents sent several emails, detailing concerns with the FBA, stating that the FBA report had been drafted without the Parents' input, and expressing concern that the BIP had been drafted prior to the completion of the FBA.

51. Also, on November 17, 2022, the Student's Father emailed the case manager, stating the Student would not be attending the social group the next day due to anxiety; he further stated the Student "does not feel safe there. She doesn't feel like she has gotten to know anyone there, does not feel they meet her needs, and does not want to be there long term."

52. On November 21, 2022, the Parents emailed the school psychologist with several concerns about the FBA.

The school psychologist responded, thanking them for their feedback and sending a revised draft FBA report, "to address several of your concerns" and stated they could discuss further concerns at the team meeting.

53. On November 22, 2022, the Student's IEP team met to review the draft FBA.

The District stated in its response and provided meeting notes, indicating the Parents had numerous concerns with the draft FBA. Concerns ranged from disagreeing with a “homeschool placement” being considered general education (the Parents stated the Student has never been in a traditional general education placement), to disagreement with the need to do an evaluation or FBA prior to a change in placement.<sup>2</sup> The notes indicated the FBA was based on limited data, “only 70 minutes of observation...plus a home visit” and that the “majority of the information on the FBA is outside support,” including information from the Student’s previous school district, multiple of the Student’s private providers, and the Parents.

The District stated it proposed continuing the team discussion of the revised draft FBA to incorporate the Parents feedback, discussing the development of a BIP, and discussing the Student’s IEP and placement at a meeting on November 30, 2022.

The Parents stated in their complaint that during this IEP meeting, they also requested changes to the Student’s accommodations, support, modifications, and placement. The Parents stated that none of their requests were “appropriately documented” in a prior written notice.

The District stated that the Parents again requested a significant change in the Student’s placement—the Parents wanted the Student placed in the District’s more restrictive “Intervention Classroom” program instead of a majority general education placement (as indicated in the Student’s IEP). The District stated that the IEP team would address the Student’s placement but needed to complete the FBA process.

54. On November 23, 2022, the Student’s Father emailed the director, stating, in part, that “as the school district decided to require an FBA instead of a re-evaluation. We wish to appeal this decision” and stated the District failed to provide the Parents with information about the difference between an FBA and reevaluation or provide them documentation of their rights. The Parent shared concerns about the school psychologist and requested an independent educational evaluation (IEE).

The director responded and noted the Parents had requested the District consider a placement and that the “Development of an FBA and BIP are necessary for students that are service in that program [that the Parents requested].”

The Parent replied and detailed the differences between an FBA and reevaluation, reiterated his concerns and position, and requesting that the District provide a prior written notice, documenting why an FBA was required.

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<sup>2</sup> The Parents reiterated many of these concerns in the complaint and in emails following the FBA meeting. Some of these concerns included the school psychologist sharing private/confidential information about the Parents that was unrelated to the FBA, and the “initial draft of the FBA...insulted parents by mischaracterizing [Student’s] non-attendance at school as parent’s refusal to punish student for non-attending.” The Parents also disagreed with the fact that the draft BIP was developed “concurrently” with the FBA and created without Parent input.

The director responded and provided a technical assistance paper (TAP) from OSPI.<sup>3</sup>

55. On November 28, 2022, the District emailed the Parents the FBA.

A prior written notice, dated November 28, 2022, indicated that revisions were made to the FBA based on Parent concerns communicated via email on November 18 and 20, 2022, and following the November 22, 2022 meeting during which Parents expressed disagreement with parts of the FBA. The prior written notice listed Parent concerns including:

- Objected to the use of the word "tantrum" (unless a quotation from a doctor), but did not want this in the description of behavior section.
- Rejected "noncompliance, off-task behaviors, and elopement" as target behaviors in the FBA because they are accommodations on the IEP and the "Parents do not think that these behaviors should be on the FBA/BIP."
- Disagreed with the definition of "off-task behavior" as it was "too vague."
- "Non-compliance – parents report that they are not looking for compliance, they just want [Student] to be in the classroom and be non-disruptive."
- Disagreed with the use of the term "extinction" and the use of interventions to make "off-task behaviors" extinct.
- "Parents want the hypothesis statement to include [Student's] unmet needs and lagging skills."
- Parents indicated that trauma had impacted the Student's behaviors.

The notice documented that after the meeting, the Parents emailed the psychologist, stating the hypothesis statement did not need to be removed but that Parent input be included: "[Student's] behaviors are often an expression of unmet needs. Target behaviors need to be addressed by meeting [Student's] needs and teaching pro-social alternative behaviors."

The notice indicated that the team considered the Parents' concerns, made revisions to the FBA, and sent the FBA to the Parents. The team proposed meeting on November 30, 2022 to review the FBA, review the draft BIP, and discuss IEP and placement.

The notice also stated:

Parents requested a change of placement into the [District] Intervention Classroom (IC) program. It was explained to parents that because the current [previous district] IEP (which was accepted by the [District] did not indicate the need for such a restrictive placement (Transfer IEP indicates 96.49% placement in general education setting), that an evaluation and/or FBA was needed in order to gather additional data to inform the IEP team in determining whether the parent proposed placement change was appropriate for [Student]. The team will therefore address the substance of Parents' change of placement request at the completion of the FBA process in the upcoming team meeting.

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<sup>3</sup> In their complaint, the Parents stated the TAP supported their position and argued, based on the TAP, that a reevaluation may optionally include an FBA, but that an FBA is not required to consider changes to an IEP or placement. The Parents further stated that an FBA is only required upon parent request or in relation to disciplinary misconduct. The Parents stated that this did not apply for the Student, that the District decided to "require" an FBA.

56. Also, on November 28, 2022, the Parents emailed the director, stating the prior written notice was inaccurate and detailed requested changes.

In additional information provided during the complaint, the Parents also stated that the November 28, 2022 prior written notice “documents Parents’ concerns over the content (but not process) of an FBA that was nearly complete.” In their reply to the District’s response, the Parents further stated:

District only completed the [prior written notice] for the FBA when the FBA was done, even though parents repeatedly asked for the [prior written notice] during the process because they wanted to file a Due Process hearing request to formally object to the FBA. Parents were denied an opportunity to object to the proceedings until the proceedings were done.

57. Regarding the FBA, the District stated in its response that, the District’s proposal to conduct an FBA was appropriate prior to engaging in any further evaluative process. Student’s initial evaluation was completed less than a year ago by [another district]. The District accepted the [other district] evaluation as a comprehensive snapshot of Student’s suspected area of disability and qualification for special education services at that time as a formerly home-schooled Student.

...By rule, Student could not be reevaluated sooner than April 2022 unless both Parents and the District agreed...Instead, based upon Student’s subsequent performance in the alternative school setting within the [other district] and Parents’ reports of Student’s inability to manage in the larger setting at [middle school], the District appropriately proposed conducting a FBA to identify more targeted hypotheses and responses to Student’s barriers to success in a larger school setting...Specifically, there was no dispute at that time as to Student’s eligibility for special education services or even the recommended areas of [specially designed instruction] received by Student. Rather, the chief concern was (and is) Student’s behavioral responses to being in a larger, comprehensive school setting. While Parents indicated their disagreement with the District’s resulting FBA, that alone does not render the decision to pursue the FBA inappropriate.

Regarding the timeline for completing the FBA, the District noted that consent was obtained on October 6, 2022 and the 35-school day deadline would have been November 29, 2022. The District stated that the Student’s team met on November 22, 2022m to review the drafted FBA and that “While the District proposed to continue the team’s discussion of the revised draft of the FBA after the 35-day deadline at the proposed IEP team meeting on November 30, 2022, this was done to accommodate Parent participation in the development of the FBA.” Further, the District stated it “ultimately finalized the FBA and issued it to Parents without need for another team meeting” at the Parents’ request.

In the District’s response, it also provided a document that included the Parents’ requested alterations to the draft FBA with explanations by the school psychologist as to which requested changes were made and if the revisions were not made, an explanation of why. In response to several of the Parents’ proposed revisions, the school psychologist stated there was not enough data to support the revision—for example, the psychologist stated “my assumption is that [Student’ may very well do better in smaller classrooms with fewer overall demands, but I do not have data to determine...”

58. In its response, the District stated that prior to the planned meeting on November 30, 2022, the Parents requested a facilitated IEP meeting or mediation. Prior to the meeting, the Parents also stated they were “requesting an update to the IEP including a review of goals, accommodations, modifications, and supports followed by a review of placement.” And, at the Parents’ request, the District finalized and sent out the FBA. The District stated that the November 30, 2022 meeting had to be canceled due to a snowstorm that caused a District-wide school closure.
59. On December 1, 2022, OSPI received and opened the Parents’ complaint.
60. On December 2, 2022, the Parents emailed the District a written statement of disagreement with the FBA. The dissenting statement included that the FBA was not an “accurate and true representation” of the Student’s behavior; Parent input was not included—e.g., the Parents stated that private providers were interviewed via phone but the Parents were not and that the Parent information only included a questionnaire and “largely disregarded email communication”—the FBA was not trauma-informed; there was insufficient data to support conclusions; there was insufficient consideration of observational data; the hypothesis statement is incorrect because it quotes the Parents’ input; the target behaviors are incorrect; the framework for the target behaviors is incorrect; and information from the home school environment was ignored.
61. On December 20 and 21, 2022, the District and Parents engaged in mediation, which resulted in a signed mediation agreement, in which the Parents and District agreed to, in part, meet to develop the consent for reevaluation and FBA subject to a collaborative discussion about assessments and components that are needed for Student.
62. On January 6, 2023, the Parents, director, and clinical behavioral health specialist met. In a follow-up memorandum drafted by the Parents, the Parents noted they still disagreed that an FBA was necessary but that they were “most interested in planning for what is appropriate for our individual child” and were “interested in discussing a new FBA, either concurrently with a reevaluation or immediately following the completion of a reevaluation.” The Parents stated they “continue to maintain that an FBA is only required within a disciplinary framework,” but indicated they were open to continued conversations about whether and how specific Student behaviors would be assessed as necessary. The Parents stated, “we very much wish to continue collaboratively discussing consent for a reevaluation and FBA.”

## CONCLUSIONS

**Issue 1: Requests for IEP Meetings and IEP Amendment** – The Parents alleged the District failed to respond to requests for IEP meetings and to change the Student’s IEP services, supports, modifications, and placement. The Parents made several requests for IEP meetings. Based on the investigation, the primary concerns are with respect to holding an IEP meeting prior to the start of school and the Parents’ requests for an IEP meeting at the end of October 2022.

When a parent or district believes that a required component of a student's IEP should be changed and requests an IEP meeting, the district must conduct an IEP meeting if it believes that the change may be necessary to ensure the provision of FAPE. The District must schedule the meeting at a mutually agreeable time and place, and appropriately invite the parent to the meeting.

IEP Meeting Prior to Start of School: The Parents' position is that the District stated an IEP meeting should occur prior to the start of the school year and that the District did not schedule an IEP meeting. This appears to start with an August 15, 2022<sup>4</sup> email from the director who stated she would be meeting with the middle school special education teachers the following week and that "we will get a meeting scheduled before school starts to discuss services and schedule." However, reviewing all the documentation together, it is not clear the director was referring to an IEP meeting. Rather, it appears the director was talking about an internal staffing meeting and indeed there was a middle school "schedule meeting" on August 31, 2022.

On August 29, 2022, the District school psychologist conducted a transfer review of the Student's transfer documents, the Parents emailed and asked if they could "chat this week in order to ensure that everything is in place for a smooth start next week," and the case manager emailed on August 30, 2022, indicating that they should schedule an IEP meeting. While the communication was somewhat unclear on who proposed or requested an IEP meeting prior to the start of the school year, it was not unreasonable that the IEP meeting was held on September 14, 2022. On September 5, 2022, the Parents explicitly requested an IEP meeting, school started on September 6, 2022, and an IEP meeting was scheduled and held on September 14, 2022—a week after school started. OSPI finds no violation.

End of October IEP Meeting Request: Following IEP meetings on October 5 and 25, 2022, the Parents requested on or around October 25 and 28, 2022, that another IEP meeting be scheduled. The director responded that the FBA meeting was scheduled for November 22, 2022, and on October 30, 2022, clarified that an IEP meeting would be scheduled as well. On November 14, 2022, the Student's Father emailed that there had been no response to his request for an IEP meeting. The director responded, referencing an email from October 28, 2022, where she previously stated, "the development of the BIP and IEP conversation would follow the completion and presentation of the FBA." The director stated they would consult with the team about scheduling an IEP meeting. The Parents responded to the director, stating they did not agree to delay "the requested IEP meeting until after the FBA."

The Parents may have disagreed with completing the FBA, meeting about the FBA, and then holding an IEP meeting; however, this was a reasonable course of action. As discussed below, it was appropriate to finalize the FBA prior to making changes to the Student's IEP, as the FBA was to inform the IEP team's decision making. Further, the District was responsive to the Parents requests for an IEP meeting—in other words, the District did not refuse to schedule a meeting, the District agreed and ultimately scheduled a meeting, just not in the timeline the Parents would have preferred.

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<sup>4</sup> The Student enrolled in the District on or around August 15, 2022.

While the IEP meeting scheduled for November 30, 2022—following the completion of the FBA—had to be canceled due to a snowstorm, this was outside the District’s control. The scheduling was further impacted by the Parent’s requesting a facilitated IEP meeting or mediation, and eventual mediation and next steps resulting from that in December 2022. So, although the requested and initially scheduled IEP meeting has not yet occurred, OSPI does not find a violation because the District scheduled an IEP meeting and then the meeting was delayed by factors outside the District’s control and subsequent events. OSPI does recommend the Student’s IEP team meet as soon as possible, however, to address planning for a reevaluation and/or FBA.

Requests for IEP Amendment: The Parents also alleged the District failed to update the Student’s IEP to change services, supports, modifications, and placement. When developing or amending a student’s IEP, the IEP team must consider the strengths of the student, the concerns of the parents for enhancing the education of their student, the results of the initial or most recent evaluation, and the academic, developmental, and functional needs of the student.

As discussed below, the District’s position that an FBA was needed prior to significantly changing the Student’s services or placement was reasonable. At the same time, the IEP team could have and did consider other requests to change supports and modifications. While the IEP team did not formally amend the IEP, it did respond to Parent requests and attempted to support the Student attending school. For example, following emails and concerns expressed by the Parents, the District held a “meet and greet” for the Student and special education teacher; planned to have the Student arrive a few minutes early or late for the social group to facilitate navigating the halls when it was less crowded; developed and attempted to implement a modified schedule in order to address the Student’s stress and anxiety in larger instructional settings; arranged to have someone meet the Student and walk her to class; started the modified schedule only after informing the Student of the plan; and worked to find a safe place for the Student to take a break and call home if needed. The team agreed to support a “phased introduction to [middle school] by focusing on the Friday social/emotional group, have Student’s teachers meet with [the Student] remotely and build report, and provide Student with additional adult support and a break space.” Later, the team arranged for the Student to do a “walk through” with the case manager and further modified the Student’s schedule (from participating in a weekly social group and daily math class, to proposing the Student work 1:1 with a paraeducator for an additional class period, to the District offering the Student 60 minutes per day of social/emotional/behavioral instruction plus the weekly social group).

Overall, given that the team was conducting an FBA and attempting to support the Student in attending school, OSPI finds that it was acceptable to wait to amend the IEP, and instead propose and try a variety of strategies in response to the Parents’ concerns and requests. While the District did not adopt every proposal of the Parents, as requested, the overall documentation indicates the District was trying to support the Student. Thus, OSPI finds no violation with respect to waiting to formally amend the IEP.

**Issue 2, 3, and 5: FBA, Evaluation, & Parent Participation**<sup>5</sup> – The Parents alleged the District improperly required an FBA instead of a reevaluation, and then failed to follow procedures in conducting the FBA.

Decision to Conduct an FBA: The Parent’s primary allegation was that the District “required” an FBA, that it was not appropriate to conduct an FBA, and that instead a reevaluation should have been conducted.

An FBA is generally understood to be an individualized evaluation of a child to assist in determining whether the child is, or continues to be, a child with a disability, and to identify the function or purpose behind a child’s behavior. A school district must ensure that a reevaluation—which could be or include an FBA as an FBA is a type of evaluation and is an assessment/evaluation measure that can be used as part of any reevaluation to provide the IEP team with the information it needs—of each student eligible for special education is conducted when the school district determines that the educational or related service needs, including improved academic achievement and functional performance of the student warrant a reevaluation, or if the parent or teacher requests a reevaluation. A reevaluation may not occur more than once a year, unless the parent and school district agree otherwise.

The Parents are correct in their position that an FBA is only *required* when there has been a disciplinary action and following a manifestation determination meeting. However, an FBA may be *needed* for an individual student in the absence of discipline, because the student’s IEP team determines a need. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. This could include a range of “behaviors” from misconduct in the disciplinary context, to behaviors such as school refusal and those stemming from stress and anxiety connected to a student’s disability—in other words, behaviors that impede the student’s learning or the learning of others.

Thus, while the circumstances here did not *require* an FBA, the relevant framework for analysis was not whether the FBA was legally required, but instead whether the IEP team determined there was a need for an FBA.

Here, the IEP team determined a need for an FBA at the IEP meeting on September 14, 2022. The Parents disagree with this characterization, stating that the District told them an FBA was “required” beginning in August 2022. However, OSPI finds this is not clear in the documentation. The director did mention an FBA in early August 2022, but even if the director mentioned this and the District believed an FBA was needed prior the IEP meeting, that does not mean a final decision was made prior to the September 14, 2022 IEP meeting. Prior to the IEP meeting, the District had limited information about the Student provided by the Parents and one interaction with the Student at a meet and greet. Thus, the IEP team determined on September 14, 2022, that an FBA was needed to gather additional data on how to address the Student’s stress in larger instructional settings as reported by the Parents and to inform the development of a BIP. And, while it is clear

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<sup>5</sup> OSPI notes these issues were opened for investigation as separate issues; however, upon investigation OSPI finds that the issues surrounding the FBA and parent participation are intertwined.

the Parents disagreed with the decision, this does not mean the IEP team decision was in error. The District members of the IEP team believed an FBA was needed to determine and provide FAPE for the Student, in response to concerns and needs expressed by the Parents that the Student would struggle to engage with school.

The Parents stated that the requests they made should have triggered a comprehensive reevaluation and not an FBA. OSPI finds that the documentation reviewed in the complaint does not clearly support this at the time the FBA decision was made. The Parents did express concerns about ensuring that appropriate services, accommodations, and supports were in place and shared concerns about the Student's anxiety and struggle to engage with school since August 2, 2022, before the Student had enrolled in the District; and, the District had seen the Student's recently completed initial evaluation and initial IEP from the previous school district. So, at the start, the Parents' concerns were likely determined to be general questions about a new student enrolling in the District. The initial questions were not necessarily an indication that either a reevaluation or FBA were needed.

Ultimately, there are several reasons why OSPI finds that an FBA was an appropriate type of reevaluation to conduct and there was no clear need for a reevaluation with a broader scope. First, the Parents' concerns were largely framed around appropriate supports to address the Student's need for social support, anxiety, and ability to engage with a traditional school environment. Notably, the special education service areas the Student received services in were in the areas of social/emotional and behavior. There is no indication that there was any disagreement about the Student's eligibility for special education or any indication that additional service areas were needed. Finally, and while perhaps a later rationalization in response to the complaint, but nonetheless valid, the Student had been comprehensively evaluated and found eligible for special education services in a previous district less than a year before, and the District accepted that evaluation upon transfer; thus, absent a compelling need and agreement by the Parent and District, it would have been inappropriate (and likely for certain assessment protocols invalid) to conduct another comprehensive evaluation.

Overall, OSPI finds the decision to conduct an FBA was appropriately determined by the IEP team as needed for the Student and finds no violation of the IDEA and state special education regulations.

Documentation of the FBA Decision: Prior written notice ensures that the parent is aware of the decisions a district has made regarding evaluation and other matters affecting placement or implementation of the IEP. It documents that full consideration has been given to input provided regarding the student's educational needs, and it clarifies that a decision has been made. The prior written notice should document any disagreement with the parent, and should clearly describe what the district proposes or refuses to initiate.

Neither the September 14, October 5, nor October 25, 2022 prior written notices mention the Parents' disagreement with the decision to conduct an FBA. The Parents maintained that at each IEP meeting, they asked why an FBA was "required" and expressed disagreement with the FBA; later expressed concern at how long it was taking to get the Student in school; and throughout

October and into November 2022, expressed in numerous emails their disagreement with the decision to conduct an FBA and asking what the “legal basis” for conducting an FBA was. The October 5, 2022 prior written notice included some of the concerns expressed by the Parents, including “frustration with the duration of the process.” The November 28, 2022 prior written notice documented the Parents’ disagreement with the substance of the FBA, although not the initial decision to conduct an FBA. Overall, OSPI finds that the prior written notices failed to sufficiently document the Parents’ disagreement, which is a core component of a prior written notice. OSPI finds a violation and the District will be required to conduct training for certain District staff.<sup>6</sup>

FBA Timeline: The Parents alleged the District delayed beginning the FBA and failed to timely complete the FBA.

As with other evaluations, to conduct an FBA, the district must obtain parent consent and complete the FBA within thirty-five (35) school days after receipt of consent. Once the need for a reevaluation is identified, a district must act “without undue delay and within a reasonable period of time;” and the U.S. Department of Education, Office of Special Education Programs (OSEP) has indicated that waiting several months to seek consent is generally not reasonable.

The District’s 2022–2023 school year began on September 6, 2022. While the director mentioned the need to consider an FBA in a phone call with the Parents on August 2, 2022, the IEP team did not determine a need for an FBA until the IEP meeting on September 14, 2022. Initially, the school psychologist proposed beginning the FBA once the Student began attending the middle school on a modified schedule. As of September 14, 2022, this was a reasonable position—the Student had not yet attended school and as the Student has been in a different district the previous year, the District had little to no firsthand experience with the Student to determine her needs. The District provided the Parents the FBA consent form and the Parents signed and returned consent on October 6, 2022, a month after school started. When considering the subsequent events and given the benefit of hindsight, this looks like a delay. However, at the time, the District’s plan was reasonable, and the FBA began a month after school started, which is not an unreasonable delay.

35 school days after October 6 was November 29, 2022. The Student’s team met on November 22, 2022, to review the draft FBA. Following this meeting, the District incorporated Parent input and feedback into the FBA. The District did propose to continue the team’s discussion of the revised FBA after the 35-day deadline at a proposed IEP team meeting on November 30, 2022, and the District stated, “this was done to accommodate Parent participation in the development of the FBA.” Regardless, the District finalized the FBA and sent it to the Parents prior to November

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<sup>6</sup> OSPI notes the Parents stated that they repeatedly “asked for the [prior written notice] during the process because they wanted to file a Due Process hearing request to formally object to the FBA.” However, there is no requirement to have the prior written notice, documenting disagreement, prior to filing a due process. And in fact, here, the Parents expressed disagreement through and exercised their rights to request IEEs and file a special education community complaint. Thus, OSPI finds that training is a sufficient corrective action and there was no material impact on the Student’s access to a FAPE specifically because of the prior written notice error.

30, 2022, without a meeting at the Parents' request. Overall, OSPI finds no violation with respect to the timelines to complete the FBA.

FBA & the Draft BIP: The Parents alleged it was a violation to create a draft BIP in conjunction with finalizing the FBA. OSPI notes although the FBA is often important in informing the contents of a BIP, there is no requirement to conduct an FBA prior to developing a BIP—a BIP could follow an FBA sequentially or be created independently of an FBA, if the IEP team has sufficient data already. Further, in this case, the BIP was a draft and had not yet been finalized. Thus, OSPI finds no violation that a draft BIP was created as the FBA was being finalized.

Parent Participation & the FBA: The Parents further alleged the District failed to follow procedures for conducting an FBA, including that Parent input was not considered, and that Parent participation was limited by not providing the Parents with information/answers to their questions.

Parental participation in the IEP and educational placement process is central to the IDEA's goal of protecting the rights of students with disabilities and providing each student with a FAPE. A school district must ensure that one or both of the parents of a student eligible for special education are present at each IEP team meeting or are afforded the opportunity to participate.

One major concern of the Parents is that throughout the fall, they asked questions about the FBA, specifically why the FBA was required and the Parents felt they did not get a sufficient answer and this limited their ability to participate. On November 23, 2022, in response to continued questions from the Parents, the District provided additional information about changing a student's placement and the FBA process, including providing guidance from OSPI. It likely would have been helpful for the District to provide more thorough information about the FBA process at the start of the school year to the Parents as this issue became a barrier to collaboration between the Parents and the District; however, OSPI finds that the Parents were still able to and did actively participate in the process, even though much of their participation was signaling disagreement. While the District could have provided the Parents better information earlier, this does not alone rise to the level of a violation of the IDEA.

The Parents participated in the FBA through a questionnaire, information provided in emails and during a home visit, and detailed feedback on the FBA. The Parents' input was incorporated into the FBA in part—the District provided a document explaining why certain revisions requested by the Parents were made to the FBA and why other revisions were not appropriate to make or the District did not agree to make—and the FBA and Parent concerns were discussed at the FBA meeting in November 2022. The meeting notes and prior written notice, as well as emails, documented the Parents' disagreement with the FBA and indicated the District and IEP team considered the feedback. Disagreement with an outcome does not necessarily mean that participation was limited, and here the Parents were engaged participants.

Aside from the FBA, the Parents throughout the fall communicated concerns with the Student's ability to access the school environment and the District was responsive—as discussed above in Issue 1, planning and providing for a modified schedule and other accommodations to access

school, and holding three IEP meetings, plus a meeting to review the FBA. The Parents attended and participated in all IEP meetings.

Overall, OSPI finds that the Parents' participation in the FBA was not limited and despite ultimately disagreeing with the FBA, the District did work to address the Parents' concerns and incorporated their feedback into the FBA as appropriate. The Parents and District have taken next steps to work through and resolve their disagreement—participating in mediation and are planning to meet to develop the consent for reevaluation and FBA subject to a collaborative discussion about assessments and components that are needed for the Student. OSPI finds no violation with respect to the FBA and parent participation.

**Issue 4: IEP Implementation** – The Parents alleged the District failed to implement the IEP. Here, the Student's IEP in place at the start of the 2022–2023 school year included 90 total minutes a week of specially designed instruction in social/emotional and behavior (60 minutes in the special education setting and 30 minutes in the general education setting).

A district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student with a disability and those required by the IEP.

To address concerns around the Student's stress, anxiety, and ability to engage in a middle school setting, the District proposed a modified schedule to acclimate the Student to school: 30 minutes a week of a social group in a special education setting and a small setting, daily math class. Had the Student attended this schedule, it is not clear that this would have provided 90 minutes per week of specially designed instruction, as it is unclear the Student would have received specially designed instruction in the math class. Regardless, the Student only attended school on September 20, 2022, and approximately two social groups on October 7 and 14, 2022. A prior written notice, following the October 25, 2022 IEP meeting, indicated that the social group was going well when the Student attended and that the Student "participates in games...and generally demonstrates appropriate social/peer interaction."

The Parents expressed that September 20, 2022 was not successful because the Student did not have time to "feel safe in [the] space before demands" were put on her. On October 6, 2022, the Parents emailed that when the Student did the "walk through," she was very stressed and approaching a "full-blown panic attack," yet "even though it didn't look like it in the moment, she felt supported by the people around her." And, on October 9, 2022, the Parents indicated the Student "seemed to have a really positive experience with school on Friday and is eager to go again;" however, following a math placement assessment, the Parents communicated that the Student's needs were not being supported and the Student did not return to school. For example, on November 4, 2022, the Parents emailed that the Student would not be attending school because despite being "eager to go to school in general," the Student did not feel supported, and her anxiety was too great. The District stated following this, the case manager "nonetheless

continued to email the family with reminders for the available opportunities for Student at [middle school].”

OSPI finds that that the contemporaneous feedback from the Parents fluctuated between stating the Student had a positive experience at school and concerns significant enough that the Student could not or would not attend school. OSPI finds this illustrates the complexity of the Student’s needs and the challenges with providing her instruction. This emphasizes how the District’s ability to implement the Student’s IEP got stuck in a pattern of the Parents stating the Student would not attend school until she felt safe, that the middle school was not appropriate for the Student, and that the Student could not attend school until she was appropriately supported in the school environment, and the District maintaining that it needed to complete the FBA and have the Student attend school in order to determine how to support her.

At the end of October 2022, the Parents began requesting that the District provide the Student with two hours per day of specially designed instruction in social/emotional and the District agreed to 60 minutes daily and the 30-minute weekly social group, while the FBA was being completed. This schedule would have allowed for the provision of more specially designed instruction than in the Student’s IEP and would thus have made up for some of the earlier missed instruction. However, despite the Parents requesting daily instruction, the Student continued to not attend.

Overall, the Student received minimal specially designed instruction and her IEP was not materially implemented during the first semester of the 2022–2023 school year. OSPI finds that the Student did not receive a FAPE during this period. At the same time, OSPI finds that there were complicated factors that impacted the ability of the District to implement the IEP. The District made attempts to implement the IEP and that the District’s efforts were frustrated by the fact that the Student was not attending school, which was in part due to a lack of IEP team determination of an appropriate environment/setting and supports for the Student.

In general, a finding that an IEP was not materially implemented would result in a remedy of compensatory education. Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place and aims to place the student in the same position she would have been. Here, OSPI does not entirely fault the District for a failure to implement the IEP. Instead, the Parents stated the Student would not attend school appropriately supported and the District could not figure out how to best support the Student until she began attending school. Because of the dynamic, and the ongoing dispute about the FBA (addressed above), OSPI finds that an appropriate remedy is for the District to provide the Student with services, in a temporary, diagnostic placement, in order to provide some services and to create an opportunity to gather critical data about the Student’s needs to inform a reevaluation/FBA and future placement decisions. The District will thus provide specially designed instruction in social/emotional and behavior for 7 weeks, a minimum of 90 minutes of instruction per week based on the Student’s IEP (*however, if the IEP team determines that more than 90 minutes per week is needed, that is acceptable*), in a small group or 1:1 setting as appropriate, in a location that is accessible to the Student, such as the Student’s home or another appropriate

setting. Additionally, the District will collect data and provide that data to the Parents/IEP team and OSPI.

### **CORRECTIVE ACTIONS**

By or before **February 10, 2023, March 17, 2023, and May 5, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### **Compensatory Education As Part of a Temporary, Diagnostic Placement**

By or before **February 10, 2023**, the District and Parents will develop a schedule and location for 7 weeks, minimum of 90 minutes of instruction per week of compensatory education.

Unless otherwise agreed to by the District and Parents, services will be provided by a certified special education teacher. Services may be provided in a 1:1 setting or a group setting, if appropriate. Services will be provided in a temporary, diagnostic placement—in other words a location that is accessible to the Student, such as the home or other location. Services will be provided outside the Student's school day and can be schedule on weekends, over District breaks, or before or after school.<sup>7</sup> The compensatory services can be provided through a District summer program, if that program will provide specially designed instruction in the Student's areas of service. The District will provide OSPI with documentation of the schedule for services by or before **February 10, 2023**.

If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District or provider with at least 24 hours' notice of the absence, the session does not need to be rescheduled. The services must be completed no later than **April 28, 2023**.

The District must collect data on the Student's engagement and progress in service areas and the District must provide OSPI and the Parents a copy of that data and provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **March 17, 2023**. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **May 5, 2023**, the District must provide OSPI with documentation that it has completed compensatory services for the Student.

The District either must provide the transportation necessary for the Student to access these services or reimburse the Parents for the cost of providing transportation for these services. If the District reimburses the Parents for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **May 5, 2023**.

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<sup>7</sup> As the Student is likely still on a modified schedule, the services could be provided during the District's school day, as long as services are schedule outside of the Student's scheduled school day.

**DISTRICT SPECIFIC:**

**Training with Mini Module**

By or before **April 28, 2023**, all special education staff on the Student's IEP team at the middle school (certificated teachers, special education administration, school psychologist, and related service providers) will complete a training module on "Prior Written Notice in the Special Education Process". The training module has been developed by OSPI special education division and eLearning for Educators in Canvas, an online learning management system. Access to the training module in Canvas can be found here <https://www.evergreen.edu/elearningforeducators/>.

By or before **May 5, 2023**, the District will provide OSPI with documentation that the required individuals have completed the training.

*If the District would like to develop its own training or supplement the training module, please notify OSPI and provide a draft alternative training plan for consideration.*

The District will submit a completed copy of the Corrective Action Plan (CAP) Matrix, documenting the specific actions it has taken to address the violations and will attach any other supporting documents or required information.

Dated this 30th day of January, 2023

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.)