

SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 19-30

PROCEDURAL HISTORY

On April 17, 2019, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Sultan 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 April 19, 2019, 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 May 10, 2019, OSPI received the District's response to the complaint and forwarded it to the Parent on May 16, 2019. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On May 23, 2019, both the Parent and District agreed to put a hold on the complaint in an attempt to mediate the issue.

On May 30, 2019, OSPI received the Parent's reply. OSPI forwarded that reply to the District on May 31, 2019.

On June 10, 2019, OSPI received notification that the complaint had not been resolved through mediation.

On June 14, 2019, OSPI notified the Parent and District of the new timeline to complete the investigation, which is July 2, 2019.

ISSUE

1. Did the District implement the Student's June 2018 behavioral intervention plan (BIP)?

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 that legal standard. 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.

Behavior: When considering special factors unique to a student, the student's individualized education program (IEP) team must consider the use of positive behavioral interventions and supports, as well as other strategies, to address behavior in the case of a student whose behavior impedes the student's learning or that of other. WAC 392-172A-03110(2)(i).

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

IEP Implementation: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction who is eligible through enrollment to receive special education services. It 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.

"When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

FINDINGS OF FACT

2017-2018 School Year

1. During the 2017-2018 school year, the Student attended kindergarten in the District and was eligible to receive special education services under the category autism.
2. On May 29, 2018, the District conducted a functional behavioral assessment (FBA) to address the Student's significant tantrum behavior resulting from separation anxiety. The FBA made numerous recommendations for behavioral strategies to address the problem.
3. On June 11, 2018, the District and the Parent developed a behavioral intervention plan (BIP) to address morning transition and non-compliance in the education setting. (See Appendix A). The BIP stated that between September 2017 and April 2018, the Student had a total of 51 behavior events, which included tantrums and aggression towards others and objects.
4. The BIP provided strategies for reducing the Student's separation anxiety and non-compliant behavior. The data collection procedures for the "morning transition" stated:
Data will be collected daily by the classroom teacher, in the case of escalated target behaviors, the teacher will, to the best of his or her effort, record the antecedents to the behaviors, the behaviors themselves, and the intervention strategies used. These daily or per occurrence tracking sheets will be collected weekly from the classroom teacher by the resource teacher who will analyze the data for common antecedents and/or successful interventions.

The intervention strategies in the BIP that addressed the morning transition included a "communication system between school and home to provide information about events, health, etc. that will inform daily interventions (e.g., reward system, transition cues, etc.)."

The second part of the BIP that addressed "non-compliance" provided numerous strategies: a positive reinforcement system, breaks, sensory devices, snacks, one-to-one support, among other strategies. The data collection procedures stated:

The classroom teachers will be tracking behavior that falls into this category. A tracking sheet will be provided to his classroom teacher. The case manager will collect any data weekly and permanently record the data. The data will be reviewed by the case manager each week and any data that provides insight into [Student's] precedent triggers will be analyzed and more effective interventions will be considered.

2018-2019 School Year

5. During the 2018-2019 school year, the Student was in first grade and attended an elementary school in the District, and continued to be eligible to receive special education services under the category of autism.
6. On September 5, 2018, the District's school year began for grades 1-5.
7. On October 17, 2018, the District held a meeting to review the Student's IEP. The IEP stated:
[Student's] behavior does impede both his learning and the learning of those around him. When [Student] has a severe tantrum, he disregards all others and has been known to throw objects, use profanity, and push other students. He often screams and stomps during these episodes as well. [Student] is responsive to positive reinforcement and this model will be used extensively in teaching [Student] how to regulate his emotions and his reactions to not getting his way. Often, letting [Student] move to a 'safe place' within the school environment or classroom allows him to process his feelings at his own pace.

The IEP provided annual goals in the area of social/emotional and provided the following accommodations/modifications:

Accommodations

- Breaks as needed for re-direction
- Introduce change in routine or setting in a gradual manner (prior notice to schedule or staff change)
- Positive verbal reinforcement prior to corrective direction
- Preferential seating near teacher, in front of class
- Present tasks in a chunked or broken down manner
- Seat wedge for movement while seated
- Small group instruction
- Use of a fidget/sensory item to allow for sensory calming
- Use of a structured behavior chart with establish consequences and rewards
- Use of noise cancelling headphones
- Use of visual cues for expected behaviors
- Use of visual guides such as daily schedules, calendars, and planners

Modifications

- Behavior plan/contract
- Repeat/model instruction
- Limited multiple choice
- Offer alternative/modified assignments
- Take test in separate location

The IEP provided specially designed instruction in social/emotional for 30 minutes, twice a week in the special education setting from November 5, 2018 to March 28, 2019.

8. The District's response to this complaint included various systems of behavior data collection during the 2018-2019 school year. The different data collection systems sometimes overlapped when they were implemented.
 - From September 5, 2018 to September 12, 2018, the District began documenting the Student's behavior incidents with a brief description of the behavior (e.g., "threw paper (student made a comment about his drawing)").
 - From September 24, 2018 to October 12, 2018, the District used a daily behavior data sheet ("Check and Connect Card") that coded the following behaviors during each part of the Student's school day: following directions; using supplies correctly; work/being on task; and "How you are doing?"
 - From September 28, 2017 to April 30, 2019, the District collected behavioral referral data on each of the Student's behavioral incidents. Each entry provided a short description of the incident.
 - From April 19, 2018 to October 22, 2018, the District documented the Student's behavioral incidents by the day of occurrence and briefly described the incident.
9. On October 29, 2018, a facilitated IEP meeting was conducted. According to meeting notes taken by the Parent, the daily communication logs were not going home. In addition, the notes indicated the general education teacher responded to the question, "What, if any accommodations have implemented since the last meeting?" The notes indicated the general education teacher replied, "None. How do I do all of this? I can't do everything myself. There is no way I can do all the accommodations and BDP (behavior plan)." The District provided no documentation of the meeting and was silent regarding the Parent's meeting notes.
10. From the week of October 22, 2018 to the week of April 22, 2019, the District documented the Student's behavior on a per occurrence basis in its Student Wide Information System (SWIS).
11. On November 5 and November 29, 2018, the District school psychologist conducted observations of the Student during various activities. The observation report noted, among other things, that no sensory breaks were observed but reminders before transitions between activities were being provided.
12. On November 13, 2018, the District began to document the Student's behavior anecdotally. The District provided documentation of the Student's behavior on the following dates:
 - December 6, 2018
 - January 17, 2019
 - February 21, 2019
 - March 19, 2019
 - April 11, 2019

13. On an unknown date, the Parent observed the Student's classroom.¹ The Parent's document of the observation listed twenty-four questions and responses, such as the following:
- "Are sensory items/fidget readily available? If so, is [Student] using them and how often? Answer: No"
 - "Are visual daily schedules used? Calendar? Planner? Answer: No. Is there one on his desk? Answer: No"
 - "Is Math, reading, and writing being taught at [Student's] current level? Answer: Math no/Reading no/Writing yes"

The observation did not specify during what activity the Student was observed or for how long.

14. During the 2018-2019 school year, the District SWIS data reported the Student had seventeen major and fifty-two minor behavioral referrals. The documentation did not explain what constituted a major or minor referral. From September 2018 to April 2019, September had the highest average of behavioral referrals per day and the average overall declined through the school year, except in March 2019, when referrals temporarily increased.
15. On April 17, 2019, the team reviewed the Student's IEP. The IEP stated that behavior continued to impede the Student's learning and the learning of others. A BIP was in place to address the Student's behavior. An annual goal in the area of speech/language was added to the IEP, along with speech/language therapy as a related service 30 minutes, two times a week in the special education setting.
16. On April 17, 2019, OSPI received the Parent's complaint. According to the complaint, the Parent alleged that from June 2018 to the date of the complaint, the BIP had not been consistently followed.

Data Collection

17. According to the District's response, the daily tracking sheets were implemented in accordance with the Student's BIP. After a month of tracking behavior data daily, the District stated:
- ...[T]hat due to the volume of meltdowns and behaviors in her class, daily notations were not a realistic expectation...The team came to an understanding that the term 'daily or per occurrence' would be interpreted on the SWIS system which is taken after any instance where additional staff have to be called to address the student's behavior. Additional documentation would consist of weekly notes and notations from his social/emotional class that would be made available at team meetings...An addendum to the BIP was not done as the language on the document was still acceptable due to the term, 'or per occurrence'...
18. The Parent alleged that the District failed to follow the Student's BIP, which provided for a daily communication system with the Parent. The Parent stated, "These Check In Check out forms did not start until September 24th and dwindled in frequency in October."

¹ The document stated the observation occurred on October 23, 2018.

Intervention Strategies

19. The BIP provided for numerous intervention strategies, including specially designed instruction to increase his communication skills and increase his flexibility to tolerate less preferred demands/tasks.

20. In response to the complaint, the District stated:

[Student] attends social/emotional class twice a week at which time he is exposed to lessons on a myriad of subjects including how to respond to a 'no,' how to treat others, how to handle rejection, how to get someone's attention, encouraging others, communication and active listening, and many more.

During these lessons, [Student] has participated on a limited basis. One-to-one [specially designed instruction] is very difficult with [Student] as he will often not discuss any of his issues or feelings. Most classes, we have a 10 to 15 minute interactive play time and [Student] performs well (other than a couple of meltdowns) with others in the class.

21. In the Parent's reply to the District's response, the Parent stated there was no curriculum in the social skills class. The Parent also cited the April 17, 2019 IEP meeting as evidence that the District was not providing intervention strategies, but her meeting notes were unclear regarding what facts the Parent was alleging.

Plan to Support and Manage Changes

22. The plan to support and manage changes included such changes as substitute teachers, assemblies, and schedule changes, among others. The BIP stated the following:

Setting Event Strategies...Plan to support and manage changes such as substitutes, assemblies, schedule changes, breaks, etc. The plan would outline how to inform [Student] of such changes when to inform him, alternative locations, etc. This plan also should be presented to and reviewed with any new teaching staff.

23. In the District's response, the District stated:

The case manager is aware that the general ed. Teacher always gives a least a minute or two pre-warning of change or transitions. On the occasions where the case manager is aware that there is a substitute, then he will speak with [Student] during the bus pick-up time upon arrival.

24. The complaint stated, "There is no set plan especially for quick or last minute changes." The Parent cited the District's September 28, 2018 documentation that the Student refused to attend an assembly as evidence that the District was not following managing changes to the Student's schedule.

Positive Reinforcement System Implemented Daily

25. The BIP stated, "A positive reinforcement system that is linked to his replacement behavior goals will be developed and implemented daily. This might be a daily behavior chart with choice menu or a traditional token system."

26. The District stated, "General ed teacher uses verbal praise, Hershey kisses (as recommended by mom) and special assignments such as taking notes to the office, holding the library book tub, painting pictures."

27. The Parent's reply stated the following:

There is no set behavioral system in place. We have asked on multiple occasions for the chart to be provided to us. It has not been. [Student] states he is not aware of any chart or rewards. He has been given a Hershey's kiss chocolate when caught doing something good. There is no consistency when a reward is given, explanation provide to [Student], or progress goals set for [Student].

The Parent cited her miss-dated observation and meeting notes from the April 17, 2019 IEP meeting as evidence the BIP was not implemented. The observation document stated, "Behavior chart – who is guiding/tracking it, who's teaching [Student] how to earn points? Answer: The teacher provides this and stated if [Student] does 'good' he gets a cougar dollar but no structured chart or rewards system." The Parent's meeting notes from the April 17, 2019 IEP indicated that the general education teacher stated, "Behavior chart – gets verbal and Hershey kiss reward when he's caught doing something correctly. Caused frustration at the school. Not working in this environment." According to the notes, in response to the school psychologist's recommendations, the general education teacher agreed to provide a choice of two activities.

Visual Tools

28. The BIP provided for "Access to visual tools such as a daily schedule, behavior cue expectations, choices for breaks, etc."

29. The District stated in its response to the complaint:

Visual schedule and feeling cards were made available by the case manager at the beginning of this school year. His understanding is that [Student] destroyed those within a week or two and [general education teacher], gen. ed Teacher, has attempted to provide visual tools throughout the year only to have them destroyed.

30. The complaint stated, "These were provided in simple paper form at the beginning of the year. [Student] did destroy them. No other attempts were made to find a solution to the destruction, i.e., lamination or taping to the desk..."

Snack Opportunities

31. The BIP included "Frequent snack opportunities across the day."

32. The District stated, "Daily schedule is on whiteboard. Student may take breaks at any time and may go to any place in the classroom/crash pad. Student may have snacks whenever needed." The behavior specialist paraeducator added, "I also have snacks available to him while he in the success room. I will judge whether he is in a safe space to eat and will not use the snacks as projectiles."

33. The Parent stated she did not observe the Student receiving snacks during her observation.

Crisis Management Plan-Movement Plan

34. The BIP provided for a "crisis management plan that focused on safety for [Student] and others. This may include a simple movement plan (e.g., take a walk, with who, where, and for how long) and/or transitioning [Student] to an alternate space to further de-escalate (resource room, Success Room)."

35. The District's behavior specialist paraeducator stated:

I can speak to movement breaks (at least while I am working with him). When I am involved with the student while he is escalated, I consistently give him options. Walking is one of the options. I do weight whether he is safe enough to walk through a classroom before giving him the option. Often when I give him movement as a break option or encourage that choice, he will kick the cabinet, kick at me or roll himself into the pad but he is given the option most of the time. I do not recall a time that he has taken the option for a movement break. In most cases, it takes a while to get him up and moving in any way when he is escalated.

There have been multiple versions of his schedule provided from the Success Room, my understanding that any schedule that is within his reach has been destroyed. I believe there is a classroom schedule posted in his room. When I work with [Student] during escalations I consistently write the next few steps on post-it notes for him to see and move as needed or I will write them on the white board. We check off tasks or steps that completed as we move through out time together...

36. The Parent stated that she thought the de-escalation area should be moved away from being next to the bathroom. The complaint stated, "It is in a loud, bright, noisy, smelly area where people come and go on a regular basis..."

CONCLUSION

Implementation of the BIP – The complaint alleged that the District failed to consistently implement the Student's behavioral intervention plan (BIP) during the 2018-2019 school year. A BIP is required to be a part of a student's individualized education program (IEP) when it is required for the student to receive a free appropriate public education (FAPE). As part of the IEP, the BIP is required to be implemented as written. Thus, the BIP must be clear regarding what services are being implemented.

Behavior Tracking/Daily Communication

Here, the BIP provided a plan to track the Student's behavior and a daily communication system between school and home, which are not necessarily the same, but seemed to be conflated by both the District and the Parent. In addressing the morning transition behavior, the data collection procedures stated data would be taken "daily" but "daily or per occurrence" tracking sheets would be collected and analyzed weekly. The District instituted various ways to collect mostly anecdotal behavior data, which included daily, weekly, or per occurrence on a sporadic basis, except the

SWIS data, which was continually kept. Some of the data collected through different collection systems overlapped and duplicate data were collected. The District stated the BIP could be interpreted to mean that behavior data could be taken daily or by occurrence, and therefore proceeded to collect behavior data on a per occurrence basis and sent that data to the Parent.

The purpose of data collection is to establish a baseline and to monitor the Student's behavior to determine if the behavioral interventions, strategies, supports provided to the Student did what they were intended to do and be able to report that progress, or the lack thereof, to the Parent. The method and frequency of data collection depends on the unique needs of the child but the data collection must be frequent and consistent enough to provide an accurate rate of progress, while being manageable and not consuming vast amounts of time that could take away from instruction. In this case, however, the Student's BIP was not clear regarding the frequency of the data collection or what is meant by a "daily communication system." Upon review, the data collected using multiple systems is confusing and is not clear the data were being analyzed to inform interventions for the Student. It does not appear that these provisions of the BIP were being implemented consistently and thus a violation is found. The IEP team must reconvene and clarify or revise the BIP to ensure the provisions are clear to both the District and the Parent.

Other BIP Components

The complaint also stated that the District failed to implement the Student's BIP in the following areas: intervention strategies; a plan to manage transitions; a positive reinforcement system; visual tools; snack opportunities; and a crisis-movement plan. Like the IEP, the District must implement the BIP as written; although to be a violation, the failure to implement must be more than a minor discrepancy between the services provided and the services required by the IEP and the BIP.

Here, the District provided statements that the BIP was followed, including a specific statement by the behavior specialist paraeducator, but little contemporaneous documentation. The Parent alleged numerous specific incidents when the BIP was not implemented using her own observation of the Student, the observation of the school psychologist (no sensory breaks observed), and her own notes from the IEP meetings. Without questioning the accuracy of the Parent's observation or authenticity of the meeting minutes, the Parent extrapolated a single observation and a discussion during a meeting to conclude that the District was not consistently implementing the BIP. Having not observed something on one occasion is not substantial proof that the District did not consistently implement the BIP. It is possible that the Student did not need certain interventions on the day the Parent observed. Further, some of the Parent's concern is less a matter of implementation and more related to her preference on how the BIP should have been implemented, such as: the positive reinforcement system, moving the de-escalation room, and having a set curriculum in the Student's social skills class. Further, on this last point, the BIP did not require a specific curriculum in the social skills class. While OSPI reminds the District that it should strive to consistently implement the Student's BIP, occasional failures to implement some of the provisions do not amount to a denial of a FAPE. Based on the documentation, no violation is found regarding these other provisions of the BIP.

CORRECTIVE ACTION

By or before **September 13, 2019**, the District will provide documentation to OSPI that it has completed the following corrective action.

STUDENT SPECIFIC:

By **September 6, 2019**, the District will meet to review and revise the BIP, as appropriate, to ensure that the BIP's provisions are clearly written and understandable to the Parent. Specifically, the District and Parent should have a clear understanding of the data collection and daily communication system between school and home provisions.

By **September 13, 2019**, the District will submit to OSPI: 1) a copy of the meeting invitation; 2) a copy of any prior written notices; 3) a copy of the agenda or topics discussed at the meeting; 4) a copy of the IEP and BIP; and, 5) any other related documents.

DISTRICT SPECIFIC:

None.

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 ___ day of June, 2019

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