

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-03**

### **PROCEDURAL HISTORY**

On January 13, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Mount Baker 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 and the education of other students in the Student's classroom.

On January 13, 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 January 19, 2022, OSPI received a list of all the students in the Student's classroom from the District.

On January 20, 2022, OSPI identified a sample of students in the classroom to review and requested documentation from the District.

On February 4, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on February 8, 2022. OSPI provided the Parent with redacted documents regarding the other students. OSPI invited the Parent to reply.

On February 10, 2022, the complaint investigator interviewed the Parent.

On February 10, 2022, OSPI's Special Education Division received an email between OSPI's director of school safety and the Parent's private provider. On February 15, 2022, the email was forwarded to the District.

On February 11, 2022, OSPI's investigator consulted with an OSPI program improvement supervisor with an educational background and professional experience as a board-certified behavior analysis (BCBA).

On February 14, 2022, OSPI's investigator consulted with the OSPI director of health and safety who has an educational background and professional experience in addressing student behavior issues.

On February 16, 2022, OSPI requested that the District provide additional information, and the District provided the requested information on the same day. OSPI forwarded the information to the Parent on February 22, 2022.

On February 22, 2022, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on February 23, 2022.

OSPI considered all of the information provided by the Parent and the District as part of its investigation. It also considered the information received during the interviews.

## ISSUES

1. Did the District follow the required procedures when restraining and isolating the Student?
2. Did the District implement the Student's individualized education program (IEP), specifically giving the Student time to calm down before being approached?
3. Did the District provide appropriate behavior interventions, strategies, and supports to the students eligible for special education in the Student's classroom, including whether students were required to "earn their chair"?

## LEGAL STANDARDS

Restraint: Restraint as defined in RCW 28A.600.485 means: Physical intervention or force used to control a student, including the use of a restraint device to restrict a student's freedom of movement. It does not include appropriate use of a prescribed medical, orthopedic, or therapeutic device when used as intended, such as to achieve proper body position, balance, or alignment, or to permit a student to participate in activities safely. WAC 392-172A-01162.

Restraint Conditions: Restraint device shall be used only when a student's behavior poses an imminent likelihood of serious harm. The use of restraint as defined by RCW 28A.600.485 is subject to each of the following conditions: a) the restraint must be discontinued as soon as the likelihood of serious harm has dissipated; b) The restraint shall not interfere with the student's breathing; and c) any staff member or other adults using a restraint must be trained and certified by a qualified provider in the use of such restraints, or otherwise available in the case of an emergency when trained personnel are not immediately available due to the unforeseeable nature of the emergency. School districts must follow the documentation and reporting requirements for any use of restraint consistent with RCW 28A.600.485. WAC 392-172A-02110.

Likelihood of Serious Harm: Likelihood of serious harm as defined in RCW 70.96B.010 means: (1) A substantial risk that: (a) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide, or inflict physical harm on oneself; (b) Physical harm will be inflicted by a person upon another, as evidenced by behavior that has caused such harm or that places another person or persons in reasonable fear of sustaining such harm; or (c) Physical harm will be inflicted by a person upon the property of others, as evidenced by behavior that has caused substantial loss or damage to the property of others; or (2) The person has threatened the physical safety of another and has a history of one or more violent acts. WAC 392-172A-01109.

Imminent: Imminent as defined in RCW 70.96B.010 means: The state or condition of being likely to occur at any moment or near at hand, rather than distant or remote. WAC 392-172A-01092.

Follow-up and Reporting Requirements: School districts must follow the documentation and reporting requirements for any use of isolation or restraint consistent with RCW 28A.600.485. WAC 392-172A-02110. Following the release of a student from the use of restraint or isolation, the school must implement follow-up procedures. These procedures must include: reviewing the incident with the student and the parent or guardian to address the behavior that precipitated

the restraint or isolation and the appropriateness of the response; and reviewing the incident with the staff member who administered the restraint or isolation to discuss whether proper procedures were followed and what training or support the staff member needs to help the student avoid similar incidents. Any school employee, resource officer, or school security officer who uses isolation or restraint on a student during school-sponsored instruction or activities must inform the building administrator or building administrator's designee as soon as possible, and within two business days submit a written report of the incident to the district office. The written report must include, at a minimum, the following information: the date and time of the incident; the name and job title of the individual who administered the restraint or isolation; a description of the activity that led to the restraint or isolation; the type of restraint or isolation used on the student, including the duration; whether the student or staff was physically injured during the restraint or isolation incident and any medical care provided; and any recommendations for changing the nature or amount of resources available to the student and staff members in order to avoid similar incidents. The principal or principal's designee must make a reasonable effort to verbally inform the student's parent or guardian within twenty-four hours of the incident, and must send written notification as soon as practical but postmarked no later than five business days after the restraint or isolation occurred. If the school or school district customarily provides the parent or guardian with school-related information in a language other than English, the written report under this section must be provided to the parent or guardian in that language. RCW 28A.600.485.

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

IEP Implementation: A district must 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.

## **FINDINGS OF FACT**

### **2021–2022 School Year**

1. On September 2, 2021, the 2021–2022 school year began in the District.

2. On September 2, 2021, the Student enrolled in the District. The Student was a third grader who attended a District elementary school and was eligible to receive special education services under the category of developmental delay.
3. On September 10, 2021, the Student's individualized education program (IEP) team conducted a "transfer review." The Student's most current 2018 evaluation and a September 2019 IEP were conducted and developed by the previous school district.

The 2018 evaluation included a functional behavioral assessment (FBA). The FBA, in part, stated:

[Student] will avoid or escape a behavioral expectation, with intensity varying from calm refusal (laying down in the cool-down spot saying 'I'm bored') to material/classroom destruction (throwing backpacks at adults, flipping over tables and chairs) to eloping (running out of classroom into the hallway, running off campus toward his home). Approximate duration of avoidance/escape incidences range from 10 minutes to 100 minutes.

According to the transfer review, the IEP team accepted the Student's 2018 evaluation but declined accepting the 2019 IEP from the previous school district. The IEP team determined the Student would receive 650 minutes a week for each area of social/emotional, behavior, and communication as comparable services. The Student would also have an instructional assistant on the bus.

4. On September 28, 2021, the District restrained the Student in the school courtyard. According to the "Seclusion/Restraint Report Form" (form), the justification was "unauthorized exit" and "attempt to harm staff." The restraint applied was an escort, hold, and chair hold. The form identified 12 interventions attempted, including physical guidance, offered choices, and use of proximity before physically intervening. In addition, the Parent immediately came to school. The form also stated the interventions attempted were consistent with the Student's IEP. The form showed the incident was reviewed with staff, but the IEP team was not convened.
5. In this incident and the following incidents when the Student was restrained and isolated, the Parent alleged the District failed to give the Student sufficient physical space and an opportunity to calm down before restraining and isolating the Student.
6. In addition to the forms, the District provided almost minute-by-minute documentation of each incident, including numerous interventions such as "break spots" and giving the Student space before restraint and seclusion were used. The documentation showed that in some instances, the interventions were successful at the moment but soon thereafter, the Student would refuse to work and sometimes leave the classroom. The documentation also showed incidents where the Student left the classroom and building and the interventions were effective in returning the Student back into class and engaged in instruction without restraint or isolation.
7. On September 29, 2021, the IEP team developed a new IEP for the Student. The IEP provided annual goals in the areas of social/emotional, behavior, and communication along with 11

accommodations, such as access to a quiet, calm space, noise cancelling headphones, and a behavior plan/contract. The IEP provided specially designed instruction in communication, social/emotional, and behavior in a special education setting for approximately 15% of the school day.

8. On October 12, 2021, the District restrained the Student because of an “unauthorized exit” from school grounds. The form stated the Student ran from the school building and made his way on the road in front of the school and ran past two houses before being restrained and then escorted back to school. The form stated 11 interventions were attempted prior to the physical intervention, including physical guidance, offered choices, positive redirection, and reminder of consequences. The form also stated the interventions attempted were consistent with the Student’s IEP. According to the form, the incident was not reviewed with staff nor was the IEP team convened.
9. On October 13, 2021, the District restrained the Student due to an unauthorized exit to the front parking lot and injury to staff (punching staff). The form stated the staff attempted 10 interventions before implementing the two-person carry and escort. The incident was reviewed with staff, but the IEP team was not convened.
10. On October 14, 2021, the District restrained and secluded the Student for an unauthorized exit, destruction of property, and injury to staff (hitting and twisting the principal’s wrist) that occurred in the annex hallway/ramp. The form stated the District tried 12 interventions before employing a two-person escort/carry back to the classroom. The incident was reviewed with staff and IEP team was later convened on October 18, 2021.
11. On October 18, 2021, the Student’s IEP team, including the Parent, developed an emergency response protocol (ERP) to address the use of restraint and isolation with the Student. The District issued the Parent a prior written notice about proposing an ERP, stating an ERP was needed for the Student to make adequate progress. No other options were considered.
12. On October 19, 2021, the Parent and the school psychologist exchanged emails regarding the October 14, 2021 incident. The Parent asked if anyone had touched the Student before the incident. The school psychologist replied:

[Student’s] shoes kept coming untied and it frustrated him to have difficulty tying them during PE. His gym teacher helped him tie his shoes and he looked like he was feeling better for a minute but then he ran out of the gym and was crying in the hall. (Maybe because he was not successful tagging anyone?)

I sat on the floor about six feet away from him and suggested a breathing exercise. He was crying and sometimes saying ‘It’s not OK’ loudly. He appeared too elevated to have a conversation, so I tried to give him a little space and time. [Principal] arrived, got down to his level and asked him to make a choice where to take a break -this is when he ran from the school. After running for 30 minutes he was also angry that he missed PE.
13. According to both the Parent and District, the Parent soon thereafter requested to discontinue the ERP (two days after development). On October 20, 2021, the District issued a prior written

notice regarding the Parent's request to discontinue the ERP because it "does not make [Student] feel safe." The District agreed to discontinue the ERP. In place of the ERP, the District implemented the following plan: "If [Student] runs from the building and is out of the classroom, but remains on campus for more than 10 minutes, parents will be called. If [Student] leaves the campus, parents and 911 will be called."

The Parent also requested a 1:1 paraeducator.

14. On October 28, 2021, after the District conducted a reevaluation of the Student, the evaluation team met to review the evaluation results and determined the Student was eligible for special education services under the category of emotional/behavioral disability. The evaluation documented nine behavior incidents from September 24 to October 14, 2021, including the Student sometimes leaving the school and that resulted in the Student being restrained or isolated. The evaluation stated:

...His running behavior and avoidance of staff causes safety concerns in a school setting, as it is difficult to monitor his location and ensure supervision and safety. [Student] is not a threat to others or himself, unless by accident as he tries to remove himself from the situation, or in reaction to an adult trying to redirect him within her personal space bubble. It is not always possible to stay outside of [Student's] bubble, however, because he sometimes tries to leave the school campus and run from staff members, requiring redirections for this safety. At other times he hides from staff and require extensive monitoring before he is able to reengage with his learning. [Student] needs space he feels comfortable de-escalating in. The issue so far this year is that [Student's] chosen places to escape change without warning or communication with staff, and he sometimes escalates even further when found by staff and calmly directed to make a safe choice by choosing one of the designated de-escalation areas.

15. Also, on October 28, 2021, the IEP team met to review the Student's IEP. The IEP's "Team Considerations" stated the Student's behavior interfered with learning and a behavioral intervention plan (BIP) would support the Student in the general education and special education classrooms. The present levels in the Student's IEP stated the Student was able to self-regulate his behavior 50% of the time when he became upset, and the Student had run from the classroom and adults approximately 16 times over the previous 18 school days. The IEP provided specially designed instruction in the areas of communication, behavior, social/emotional and supplemental services in the area of occupational therapy.
16. On the same date, the District developed a BIP that addressed eloping from the classroom and building. The response to behavior provided for giving a "break spot" to the Student when upset. If the Student ran, the special education teacher would be called, along with support from the principal, to "use their bodies as barriers to keep [Student] safe..." The plan further stated: "When [Student] is running, no adults should engage or approach him."

The District issued a prior written notice, dated October 28, 2021, that stated the team discussed the option of "maintaining the existing position and existing placement with 1:1 aide." Both were declined by the District because the previous services did not "adequately support his behavioral and academic needs, and a 1:1 aide would not be able to sufficiently

support [Student]." The Student was placed in "self-contained program" at another District elementary school.

17. On November 29, 2021, the Student began attending the program at the new school.
18. On November 30, 2021, the District restrained and secluded the Student for an unauthorized exit. The form stated nine interventions were used before the restraint and seclusion. The form indicated that no follow up occurred after the incident.
19. On December 2, 2021, the District restrained and secluded the Student for "hammering on glass."<sup>1</sup> The form stated seven interventions were used prior to the restraint and seclusion. The follow up of the incident was reviewed with staff, but no changes to the IEP were required.
20. In the complaint, the Parent also alleged the classroom at the new school had a routine at the beginning of each school day, whereby each student had to stand by their seat and could not sit down until they displayed appropriate behavior. Based on the Student's account, the Parent alleged some students had to stand all day.
21. According to the Student's classroom teacher, the classroom did have a routine where students stood by their seats until prompted to sit in the morning. The teacher explained this was to teach students to have patience and to wait in line until it was their turn to sit down. The teacher stated there was no time when a student was not permitted to sit. The school's assistant principal verified that students were able to sit at their seat within minutes at the start of class. Students were permitted to sit down at will.
22. On December 2, 2021, the Parent emailed the special education director that the Student would no longer attend the new school. The email stated:

[Student] will not be attending school until further notice. He is scared and feels completely unsafe at [school] elementary. He has never been in imminent danger. Nor put anyone else in imminent danger. Therefore he never should have endured the unfair restraints or isolation incidents that he has. These isolation/restraint incidents have completely scared him, rightfully so. No one has shown any amount of intent to remedy the mental damage these measures have made on [Student]. Until I can be sure that the staff at [school] elementary can and will keep my son safe without the use of restraints or isolation without IMMEDIATE DANGER, [Student] will not be on the campus.
23. In an interview with the Student's special education teacher and two classroom paraeducators at the Student's new school, they recounted the interventions attempted, including giving the Student space to calm down and giving options to the Student before needing to restrain the Student. The Student attended the new school for three days before the Parent pulled the Student out of school.
24. According to data collected by the District, the Student's new school had restrained nine students 105 times and secluded seven students 77 times during the "2022 school year."

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<sup>1</sup> According to the District, the glass in the window was not unbreakable glass. It was regular glass.

## CONCLUSIONS

**Issue 1: Restraint Procedures** – The complaint alleged the District failed to follow restraint and isolation procedures. Restraint and isolation must only be used when there is an imminent likelihood of harm. If a restraint or isolation is used, a district must implement follow-up procedures following the release of the student. These procedures must include: reviewing the incident with the student and the parent or guardian to address the behavior that precipitated the restraint or isolation and the appropriateness of the response; and reviewing the incident with the staff member who administered the restraint or isolation to discuss whether proper procedures were followed and what training or support the staff member needs to help the student avoid similar incidents.

Here, the Student enrolled in the District at the beginning of the 2021–2022 school year. The Student came to the District with a history of behavioral difficulties, including a tendency to leave school grounds. The Student continued to demonstrate behavior difficulties while attending the District. The Student would exhibit refusal behaviors and sometimes leave the classroom and the school. The Student’s behavioral intervention plan (BIP) included providing the Student options, break space, and physical space when the Student was upset. When the Student left the classroom, other staff would be called to monitor the Student and block the Student’s path as necessary. The documentation in the complaint showed incidents where the Student left the classroom and building, and the interventions were effective in returning the Student back into class.

However, there were also several instances where the interventions were not successful, which led to the restraint and isolation. OSPI will not second-guess whether there was an imminent likelihood of harm at the time given the Student’s history of eloping, the fact that the Student did run toward the parking lot or road, and the Student’s ability to run away from the staff as indicated by the documentation. And, notably, the restraint and isolation documentation did indicate that the District was attempting multiple interventions prior to using restraint. Yet, the documentation shows the District was not implementing each of the required procedures following a restraint. For example, some of the restraint forms did not demonstrate that the required review with involved staff occurred following each incident. And, it is not clearly evident or documented that each incident was reviewed with the Student and the Parent to address the behavior that precipitated the restraint or isolation and the appropriateness of the response. These follow up procedures are critical as they allow an opportunity to discuss whether proper procedures were followed, whether staff need additional training or support, and whether the Student needs additional or different supports in order to avoid similar incidents.

Further, the number of restraints and isolations in a relatively short period of time—combined with behavior incidents where the Student was not restrained—should have required the District to address the incidents much more expeditiously in light of the imminent likelihood of harm presented and address the antecedent for the Student leaving the classroom in the first place that precipitated the circumstances that led to the restraints when the Student left the building. For example, the evaluation and documentation indicated the Student had nine behavior incidents from September 24 to October 14, 2021, including the Student sometimes leaving the school and then being restrained. Further, documentation indicates that the Student ran from the classroom



and adults approximately 16 times over 18 school days. While the IEP team did meet on September 29 and October 28, 2021, given the pattern of behavior emerging and the fact that the incidents were not being consistently reviewed with staff, the Student, the Parent, and the IEP team should have been convened more quickly to affirmatively address the behavior leading to the incidents and taken definite steps. Restraint and isolation must not be treated as business as usual: Taking steps to avoid restraint and isolation is a high priority.

The District proposed a change of placement in November 2021 to a different school with additional resources to support the Student. The Parent also requested (and the District denied) a 1:1 paraeducator. Denying the 1:1 paraeducator might have been a reasonable decision to give the Student time to acclimate to the new personnel and placement had there been no repeated restraints. However, the frequency of the restraints demand consideration of supports to address the behavior that led to an imminent likelihood of harm. Overall, based on the District's failure to consistently follow restraint and isolation procedures, a violation is found.

The corrective action will require training the District to respond to repeated restraints and isolation and having an IEP meeting to reconsider additional supports and interventions to avoid restraint and isolation.

**Issue 2: Calming Down** – The Parent alleged the District failed to implement the Student's individualized education program (IEP), and more specifically the BIP, that called for the Student to calm down before the staff physically intervened with the Student. A district is required to implement services in conformity of the IEP.

Here, the October 2021 BIP targeted the Student eloping from the classroom and building. The plan called for giving the Student space when the Student was upset. If the Student ran out of the classroom or building, the teacher would call the principal to assist in blocking the Student's path. The plan stated when the Student ran, "no adults should engage or approach him."

According to the incident reports and documentation, the District implemented the BIP and the results were effective at times. Other times, the plan was not effective in changing the Student's behavior and in some instances, resulted in restraint and isolation. The documentation and the interviews indicated the Student was given space to calm down to a reasonable extent. But when the Student eloped to the road, it presented an imminent likelihood of harm. Continuing to give the Student space and allowing the Student to calm down before intervening when he eloped toward the road was not reasonable in those instances. Thus, OSPI finds that even though there were instances of restraint and isolation, the BIP was materially being implemented. No violation is found.

**Issue 3: Behavior Supports** – The complaint also alleged the District failed to provide appropriate behavior support to the Student and other students in the classroom by requiring all the students to earn their chair by first displaying appropriate behavior. The IEP team must consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior.

Here, the Student's special education teacher acknowledged the classroom practice of having students stand by their chair at the beginning of the school day and wait before sitting. The purpose, according to the teacher, was to teach the students patience and waiting in line skills. Despite the Parent's claim, which was based on the Student's account that some students had to stand all day, the teacher stated no student was denied being able to sit down promptly. Because the practice had a constructive purpose and there was no evidence to substantiate that students were not permitted to sit, including observations by the assistant principal, no violation is found.

### **CORRECTIVE ACTIONS**

By or before **April 1, 2022** and **April 22, 2022**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

By **March 25, 2022**, the District must conduct an IEP meeting to consider additional behavioral supports and interventions, including assigning the Student a 1:1 paraeducator, to avoid additional incidents of restraint and isolation.

By **April 1, 2022**, the District will provide OSPI with the meeting notice, a copy of the Student's IEP, prior written notice, and meeting notes, if taken.

#### **DISTRICT SPECIFIC:**

By **April 15, 2022**, the District, in cooperation and collaboration with OSPI's director of school health and student safety and/or Northwest ESD 189, will conduct a training to all District administrators and certified special education staff. The training must address following restraint and isolation procedures, including implementing measures in a timely manner to avoid restraint and isolation.

By **April 22, 2022**, the District will provide OSPI with verification of attendance of the required participants.

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 March, 2022

Glenna Gallo, M.S., M.B.A.  
Assistant Superintendent  
Special Education  
PO BOX 47200  
Olympia, WA 98504-7200

**THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT**

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)