

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-59

PROCEDURAL HISTORY

On May 10, 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 [REDACTED] 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 May 11, 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 May 12, 2022, the District requested an extension of time to respond to the complaint. OSPI granted the extension to June 3, 2022.

On June 3, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on June 6, 2022. OSPI invited the Parent to reply.

On June 17, 2022, OSPI received the Parent's reply and additional documentation. OSPI forwarded that reply to the District on June 21, 2022.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on May 11, 2021. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUES

1. Did the District follow special education referral procedures following the Parent's request for a special education evaluation on March 10, 2022?
2. Regarding the exclusions of the Student from school since March 2022 (suspensions and shortened school day due to behavior), did the District follow procedures under WAC 392-172A-05170 to determine whether the District knew or should have known the Student had a disability and therefore was entitled to special education discipline protections?

LEGAL STANDARDS

Referral: Any person who is knowledgeable about the student may make a referral of a student suspected of having a disability. When a student suspected of having a disability is brought to the attention of school personnel, the district must document that referral. It must provide the parents with written notice that the student has been referred because of a suspected disabling condition

and that the district, with parental input, will determine whether there is sufficient data to suspect a disability. It must review the referral, and it must collect and examine existing school, medical, and other records. The district must determine within 25 school days after receipt of the referral whether it will evaluate the student. The district must provide the parent with written notice of its decision. 34 CFR §300.301; WAC 392-172A-03005.

Disciplinary Exclusions: Protections for Children Not Yet Eligible for Special Education Services: In general, a student who has not been determined to be eligible for special education services may assert any of the protections provided to students receiving special education services if the district is deemed to have knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. A district will be deemed to have knowledge that a student is a student eligible for special education if the parent of the student had expressed concern in writing to personnel of the district that the student is in need of special education services; the parent requested an evaluation of the student pursuant to WAC 392-172A-03005; or a teacher of the student or other district personnel have expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education or other supervisory personnel. 34 CFR §300.534; WAC 392-172A-05170.

Disciplinary Removals – No Change of Placement: School districts may remove a student eligible for special education who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days to the extent those alternatives are applied to students without disabilities and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement under WAC 392-172A-05155. 34 CFR §300.530(b)(1); WAC 392-172A-05145(2).

Disciplinary Removal that Results in a Change of Educational Placement: A change in placement occurs when a student is removed from his or her current placement because of discipline for more than ten consecutive days; or, when the student is subjected to a series of removals that constitute a pattern because the removals total more than ten school days in a school year, because the student's behavior is substantially similar to the previous incidents that resulted in removals, and because of additional factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another. 34 CFR §300.536; WAC 392-172A-05155.

FINDINGS OF FACT

Background

1. At the start of the 2020–2021 school year, the Student was in second grade and was not eligible for special education services.
2. On October 7, 2020, a student support team (SST) meeting was held regarding the Student. The SST notes included the following health concerns: "ADHD [attention-deficit/hyperactivity

disorder] and other mental Health Diagnosis.” The document indicated the Parent had requested a special education evaluation and the recommendations indicated the Student had been doing better with behavior and that the team, at that time, wanted more data before deciding on whether to evaluate for special education eligibility. The SST planned to meet again in January 2021.¹

3. In June of 2021, the Student was noted by her school counselor as being on a list for academic concerns.

2021–2022 School Year

4. At the start of the 2021–2022 school year, the Student was in third grade and attended an elementary school (school 1) in the District. The Student was not eligible for special education services.
5. At school 1, the SST filled out an “SST Intervention Action Plan Student Intervention Planning Form” for the Student, which included academic and behavioral concerns. School 1 SST planned to meet to discuss the Student on December 15, 2021.
6. On December 5, 2021, the Student started at a different elementary school (school 2) in the District.

In an email from the Student’s prior teacher to the new school, the prior teacher noted academic and behavior concerns and stated that the Student was “on our roster for evaluation for a learning disability as she is about two and a half years behind in math and reading.” School 1 shared information and data about the Student with school 2, including that during second grade, the Student was taking “a mood stabilizing medication that helped with behaviors.”

7. According to the Parent’s complaint, the Student had struggled in academics, social, and behavioral skills. The Parent stated that she and the Student’s teachers had shared these concerns since first grade.
8. On December 9, 2021, the school counselor emailed the Student’s teacher, stating, “let’s wait until after Xmas break to decide when we want to SST her and which interventions you would like to keep or change up from the previous teacher.” The counselor noted the Student had had a number of absences the prior year and that she was making growth before the COVID-19 pandemic.
9. Emails from District staff in December 2021, February 2022, and March 2022 indicated the Student was struggling with behavior at recess and in class. Emails indicated staff were trying a variety of interventions, including a daily behavior chart.

¹ Notes from the 2022 SST meeting at the Student’s new school indicate that school 1 decided not to evaluate the Student for special education services after the Student “showed significant improvement.”

10. On March 8, 2022, according to the Parent's complaint and emails from the Parent, the Student was suspended, and the Parent was asked to pick the Student up early from school.
11. On March 10, 2022, the Parent emailed the school 2 principal and requested the Student be evaluated for special education eligibility.

The principal responded and stated she forwarded the Parent's request to the school psychologist. The principal noted that, "throughout the referral process, we will continue to follow the strategies we have in place as well as district discipline procedure to address any further aggressive behavior."

12. On March 11, 2022, the principal responded to the Parent's email and stated they could not accept email requests for evaluations and that the request must be "made in writing, signed and dated." The principal subsequently emailed that the email request was sufficient and that the Parent would be receiving a prior written notice and next steps.

13. Also, on March 11, 2022, the District was closed.

14. On March 14, 2022, the school counselor emailed the Parent a release of information for the Student's healthcare provider and a prior written notice. The prior written notice indicated the SST would review the Student's data and determine whether to initiate a special education evaluation. The prior written notice documented that a decision would be made within 25 school days or April 21, 2022.

15. The District noted in its response that the Parent declined to complete the healthcare release of information, despite several requests from the District. On March 14, 2022, the Parent stated that she "did not feel medical information needs to be given at this time since the behavior is at school."

In subsequent emails, the Parent stated she had "no medical information to give only my concerns and the concerns from staff to share" and that the Student did not have any medical diagnosis. Following a request from the school psychologist after the evaluation was initiated, the Parent stated, "As for medical information there is no medical information to share at this type [sic] because there is no diagnosis."

16. On March 15, 2022, the Parent met with the principal to discuss the Student and how the Student could be successful at school. During the meeting, the principal asked the Parent whether the Student had a diagnosis of ADHD.

In an email following the discussion with the principal, the Parent stated that the Student did not have a formal diagnosis of ADHD and reiterated that she would not be signing the medical release form.

In a reply email, the principal explained to the Parent that data from a previous SST meeting related to the Student from her second-grade year noted the Student may have ADHD. The principal stated she was trying to clarify, noting the Parent had said the Student "does not

have a 'formal diagnosis but has been previously on medication for [ADHD].'" The principal also stated that the medical release was not required, but requesting medical information was part of the evaluation process and could be very helpful in determining if a student has a disability.

17. On March 25, 2022, the Parent emailed the principal and requested the school conduct a functional behavioral assessment (FBA). The principal responded that they would consider the request for the FBA concurrent with the request for the special education evaluation.
18. In March 2022, the Student was suspended from school on several dates, including March 15, 25, and 28, 2022.

On March 15, 2022, the Student engaged in unsafe behavior, ran away from staff, refused to listen to the teacher, locked the teacher and classmates out of the classroom, and then left the school building. The Student was suspended for the remainder of the day, a total of four hours.

The Student also received an in-school suspension on March 18, 2022.

The Student was suspended on March 25 and 28, 2022 for behaviors occurring on March 24, 2022. These behaviors included unsafe behavior, destruction of school property (wrote on tables and other students' clothing), and assault without major injury. The Student chased several classmates with scissors, cut another student's shirt, and locked the teacher in the classroom.

Additionally, emails and behavior forms from March 2022 indicated the Student also continued to be defiant, combative, and exhibit behaviors (although not all resulted in formal discipline). Emails also described strategies and interventions the staff were using.

19. On March 29, 2022, the Student was absent from school due to an appointment.
20. The District was on spring break from April 4 through 8, 2022.
21. On April 13, 2022, the school counselor emailed the Parent and invited her to the SST meeting that was to be held April 15, 2022. The Parent did not attend.
22. On April 15, 2022, the SST met and determined the Student was several grade levels behind in reading, writing, and math. The team noted the Student was "more successful one-on-one" and reviewed previous interventions that had been tried with the Student. The SST consider information from the Student's teachers, including that the Student's attendance during remote learning was sporadic, and discussed concerns about the Student's behavior.

The team determined they would initiate a special education evaluation. The SST also suggested the Student might benefit from a shortened school day.

23. On April 19, 2022, the school psychologist emailed the Parent a prior written notice that stated the District proposed to initiate an initial special education evaluation, although noted,

“because there is insufficient time to complete a thorough and comprehensive evaluation before the end of the school year, it is in [Student’s] best interest that the evaluation be conducted in the fall of 2022-2023 academic year upon our return to school.”

24. On April 20, 2022, the Parent emailed the school psychologist, stating there were more than 35 school days left in the 2021–2022 school year and requesting that the evaluation process begin immediately. The Parent requested the consent form to sign and listed concerns about the Student’s behaviors and academic skills.
25. Also, on April 20, 2022, the school psychologist sent the Parent the consent form for the evaluation, with the following areas checked to evaluate: medical-physical, behavior, general education, cognitive, social/emotional, academic, observation, and “other: parent, teacher, and student input.” The psychologist apologized and stated she must have miscounted the remaining days in the school year. The psychologist also requested the Parent complete a confidential parent-input survey and a behavior rating scale.
26. On April 21, 2022, the District provided the Parent with a new prior written notice, indicating it would move forward with the evaluation.
27. Also, on April 21, 2022, the Parent returned the signed consent form, with additional areas suggested for assessment, including vision and executive function. The Parent also returned the parent-input survey.
28. On April 21 and 22, 2022, the District invited the Parent to the evaluation meeting scheduled for May 27, 2022.
29. April 21, 2022 was 25 school days after the Parent’s referral on March 10, 2022.
30. On April 26, 2022, the Student was absent from school.
31. In April 2022, the Student was suspended from school on several dates, including April 25 and 28, 2022. On April 25, 2022, the Student was suspended for one day for biting a staff member and on April 28, 2022, was suspended for part of the day for destroying school property and kicking two students.
32. On May 2, 2022, the District moved the Student to a half day schedule. An April 29, 2022 letter from the principal, emailed to the Parent, stated the Student was being placed on a half day schedule beginning May 2, 2022, because the Student was struggling with safe behavior and remaining in the classroom. The letter noted the school was continuing to collect data, build strategies for support, and completing the comprehensive evaluation. The letter outlined an incentive program for the Student to extend her day. The letter indicated the Parent would need to provide transportation home and that the Student could ride the bus to school, but noted that if the Parent was unable to provide transportation, the principal would appeal to the transportation department. The letter indicated the Student would come to school for the morning and return home after lunch to “capitalize on building her skills” during the time of day she was most successful.

33. The District stated that:

Beginning on May 2, 2022, the Student was placed on a reduced schedule due to her behavior...She had the ability to attend from 8:45 a.m., when school started, until 11:30 a.m. She was not permitted to attend from 11:30 a.m. to dismissal at 3:30 p.m. (or until 2:30 p.m. on Wednesdays), or for approximately 60 percent of each school day. That schedule lasted for six school days, with the Student having the ability to return full-time on May 10, 2022...In effect, that schedule constituted six removals for .6 of a school day each, or a total of 3.6 school days.

The District noted that the Student did not attend school May 3 through 9, 2022.

34. The Parent stated in her complaint that she was unable to pick the Student up in the middle of the day, and that the District needed to provide transportation to her home. The Parent noted the District offered transportation after the Parent expressed concern, but that the drop off location would be a mile away from the Student's home "in a gravel parking lot next to a busy highway." The Parent stated the Student "is not safe to be left in the community alone and she needs door to door transportation" and that the Student received door to door transportation before she was put on a half day schedule.

35. The Student did not attend school on May 3, 4, 5, 6 or 9, 2022.

The Parent noted the Student had missed school days because the Parent could not transport the Student and the Parent felt the District's transportation offer was unsafe for the Student. The District stated the Student did not attend because the Parent refused to bring the Student to school, despite the District offering to transport the Student to and from school.

36. On May 2, 2022, the school psychologist emailed the Parent a form, asking for the Parent's consent for an FBA. The District also asked the Parent to complete an executive function questionnaire and asked other follow up questions.

The Parent signed the consent form for the FBA on May 3, 2022. The Parent indicated her concerns included the Student hitting, kicking, biting, ability to communicate feelings, and various sensory concerns.

37. On May 9, 2022, the principal emailed the Parent, stating the Student could return to a full school day schedule, starting on May 10, 2022.

38. In a May 20, 2022 email exchange between the Parent and principal, the principal noted the Student had been provided 1:1 behavior support since returning to full days of school to gather data for the evaluation.

39. On May 27, 2022, the evaluation team met and discussed the evaluation. The Parent along with the general education teacher, school counselor, school psychologist, principal, special education teacher, and the Parent's advocates met. The evaluation team reviewed the FBA and evaluation, and determined the Student was not eligible for special education services. The team considered the eligibility categories of specific learning disability, other health impairment, or emotional behavioral disability. The evaluation noted the Student exhibited

behavioral difficulties, but did not have a disability or need specially designed instruction. The evaluation recommended behavior support strategies be implemented for the Student.

The team completing the FBA hypothesized that the Student's behavior was related to when the Student "has a demand placed upon her...asked to complete an academic task, follow a request from an authority figure." The FBA noted the Student will engage in hitting, kicking, threatening, and harassing behaviors to gain a sense of control and to get consumable rewards. The team did not recommend developing a behavioral intervention plan.

40. On May 31, 2022, the District issued the Parent a prior written notice, explaining the decision finding the Student not eligible for special education services. The prior written notice stated:

Finding [the Student] eligible as a student with [a specific learning disability] was rejected because she does not exhibit a discrepancy between her cognitive abilities and her academic achievement. Additionally, [the Student] has missed 14% and 15% of school days during her 2nd and 3rd grade years which is likely to have negatively impacted her academic progress. Finding [the Student] eligible as a student with [other health impairment] was rejected because there is no evidence indicating there is a health condition impacting [the Student's] educational progress. Finding [the Student] eligible as a student with [emotional behavioral disability] was rejected because she does not meet the criteria for [emotional behavioral disability] as she presents as a child who is socially maladjusted.

41. The District noted the Parent disagreed with the results of the evaluation.

42. Regarding the Student's disciplinary removals, the District stated that WAC 392-172A-05170 did not apply to the Student. The District stated it followed regulations, "although the Student had been referred for evaluation as of March 10, she was later determined ineligible" and "further, she was not removed for disciplinary reasons for either 10 consecutive school days or 10 or more cumulative school days that constituted a change of placement."

The District stated that when the Student was the subject of disciplinary actions, there was no change in placement and that the District was never "deemed to have knowledge" that the Student was eligible for special education because the initial evaluation determined the Student was not eligible. Thus, the District stated it disciplined the Student using the same disciplinary measures applied to students without disabilities. The District stated the Student was suspended for a total of 8.7 days between the referral on March 10, 2022 and finding the Student ineligible for special education on May 27, 2022.

CONCLUSIONS

Issue One – Referral: The Parent, in her complaint, raised concerns that the District failed to follow referral procedures when it stated it could not accept an email referral and initially sought to delay beginning the evaluation until the fall of 2022.

When a parent refers a student for a special education evaluation, the district must document that referral. It must provide the parents with written notice that the student has been referred because of a suspected disabling condition and that the district, with parental input, will determine whether

there is sufficient data to suspect a disability. It must review the referral, and it must collect and examine existing school, medical, and other records. The district must determine within 25 school days after receipt of the referral whether it will evaluate the student. The district must provide the parent with written notice of its decision.

Here, the District made some misstatements about the requirements for a special education referral but corrected those statements, and overall followed procedures. For example, the Parent made a referral for a special education evaluation email on March 10, 2022. The principal initially stated it could not accept an email referral, but quickly corrected this statement. On March 14, 2022, the District emailed the Parent a prior written notice documenting the referral, and within the required 25 school days, the District—after reviewing information provided by the Parent and other information about the Student—decided it would evaluate the Student. The District also documented this in a prior written notice sent to the Parent on April 19, 2022.

The District did, initially, improperly seek to delay the evaluation until the fall of 2022 as it believed it did not have sufficient time left in the 2021–2022 school year to complete the evaluation. However, after the Parent’s email seeking to clarify this, the District corrected its mistake, promptly sent the Parent a consent form for the evaluation, and then completed the evaluation within 35 school days of receiving the Parent’s consent.

Overall, the District followed referral procedures. OSPI finds no violation.

Issue Two – Discipline Protections: The Parent, in her complaint, raised concerns regarding the Student being denied a free appropriate public education (FAPE) because she was disciplined, suspended, and then placed on a half-day schedule.

As the Student was not eligible for special education services, OSPI determined that the applicable discipline regulation was the regulation addressing protections provided for students not yet eligible for special education services. Regulations provide that a student who has not been determined to be eligible for special education services may assert any of the protections provided to students receiving special education services, if the district is deemed to have knowledge that the student was a student with a disability before the behavior that precipitated the disciplinary action occurred. One way a district will be deemed to have knowledge that a student is a student eligible for special education is if the parent of the student had expressed concern in writing to personnel of the district that the student is in need of special education services, or the parent requested an evaluation of the student.

Here, the Parent requested a special education evaluation, which put the District on notice that the Student *might* be a student with a disability; thus, making this regulation potentially applicable to the Student. However, even a student with a disability can be disciplined as districts may remove a student eligible for special education who violates a code of student conduct from her current placement to another setting or suspension, for not more than ten consecutive school days, to the extent those alternatives are applied to students without disabilities and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement. In

short, a change of placement occurs when a removal is for ten consecutive days or a pattern of removals totaling more than ten days.

There is no question that the Student was struggling with behavior at school. After the Parent referred the Student for a special education evaluation and the referral and initial evaluation process began, the Student was suspended several times and briefly placed on a shortened school day schedule. However, the District noted, and the documentation verified that the Student was suspended for behaviors in line with the code of conduct as other students would be disciplined. Further, the documentation indicated that between the special education referral and the Student's evaluation meeting, the Student was suspended or on a shortened school day schedule for about 8.7 days. Therefore, even if the District was deemed to have knowledge of the Student being a student with a disability, the Student had not been suspended for more than 10 days and her placement had not been changed; thus, the additional special education discipline requirements, such as conducting a manifestation determination, would not apply.

Finally, the District is not "deemed to have knowledge" of the Student being a student with a disability because the evaluation found the Student ineligible for special education services as the evaluation found that despite having behavior challenges, the Student did not have a disability that met the eligibility criteria outlined in special education regulations and did not have a need for specially designed instruction. Thus, as the Student was not found eligible for special education services, the additional discipline regulations applicable to students eligible for special education services do not apply. The District was able to discipline the Student using measures applied to students without disabilities. And OSPI notes that here, even though the Parent disagreed—primarily it seems because the Student's behavior was not improving—the District was attempting to address the Student's behaviors by trying a variety of behavior interventions and strategies. The District did not deny the Student a FAPE when it disciplined her, as the Student, not being found eligible for special education services, was not entitled to a FAPE.

Overall, OSPI finds no violation with respect to discipline.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this ____ day of June, 2022

Dr. Tania May
Assistant Superintendent of Special Education
PO BOX 47200
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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.)