

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-02

PROCEDURAL HISTORY

On January 9, 2023, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Federal Way 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 January 10, 2023, 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 27, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On February 14, 2023, OSPI contacted the Parent to request that she provide additional information or a reply. The Parent stated she was going to consult with an attorney but did not provide additional information to OSPI.

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 January 10, 2022. 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.

ISSUE

1. Since January 10, 2022, did the District follow procedures to sufficiently evaluate the Student's eligibility for special education services, including considering the Student's social emotional and behavioral needs?

LEGAL STANDARDS

Evaluation/Reevaluation Report: An evaluation report must be sufficient in scope to develop the student's IEP, and at a minimum should include: a statement of whether the student has a disability that meets the eligibility criteria under IDEA; a discussion of the assessments and review of data that supports the evaluation group's conclusions regarding eligibility, including any additional information required under WAC 392-172A-03080 for students with specific learning disabilities; how the student's disability affects his or her involvement and progress in the general education curriculum, or for preschool children, in appropriate activities; the recommended special education and related services needed by the student; other information needed to develop the IEP; and the date and signature of each professional member certifying that the report reflects his

or her conclusion, or, a statement representing the professional member's conclusion if he or she disagrees with the report's conclusions. 34 CFR §300.305; WAC 392-172A-03035.

An evaluation report interprets evaluation data to determine if a student is eligible for special education services, and if so, the student's needs. 34 CFR §300.305; WAC 392-172A-03035. The report must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, the student's physical condition, the student's social and cultural background, and adaptive behavior. In completing the evaluation report, the school district must ensure that information from all sources is carefully considered. 34 CFR §300.305; WAC 392-172A-03040. The evaluation report must include documentation of the individual assessments of each professional member of the group who contributed to the report that indicates: the procedures and instruments that were used and the results obtained; any conclusions from observations of the student; and a statement of the apparent significance of the findings as related to the student's suspected disabilities and instructional program. 34 CFR §300.305; WAC 392-172A-03035. If the evaluation results in a determination that the student is eligible for special education and appropriate related services, the district must then conduct an IEP meeting to develop an appropriate IEP. A district must provide a copy of the evaluation report and documentation of determination of eligibility to the parents, and at no cost to the parents. 34 CFR §300.306; WAC 392-172A-03040.

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. *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 and attempt to prevent future behavioral violations. *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).

FINDINGS OF FACT

1. At the start of the 2021–2022 school year, the Student was not eligible for special education services and attended kindergarten in the District.

2. In October 2021, the District referred the Student for a special education evaluation. The referral documented concerns raised by both the Parent and District regarding the areas of communication, social/emotional/behavioral, and academics.

The referral document identified general areas of concern with the Student's ability to understand questions, discussions, and stories; use of correct sentence structure and grammar in oral communication; ability to express ideas in a clear and organized fashion; ability to hold conversations with peers and adults; that she speaks with stereotyped/echolalic language; and concerns about her ability to follow classroom rule, impulsivity, ability to change tasks, and ability to stay seated in assigned work areas.

3. On October 21, 2021, the Parent signed the consent form for the initial evaluation. The consent form indicated the evaluation would address the areas of learning and achievement, observation, psychoeducational assessment, social/emotional assessment, adaptive behavior, and speech/language evaluation.
4. On December 8 and 17, 2021¹, the District and Parent met to discuss the evaluation, recommendations, and Student's eligibility for special education. The Student was found eligible for special education services under the eligibility category developmental delay. The evaluation report documented recommendations that the Student receive specially designed instruction in reading, math, written language, adaptive behavior, communication, and social/emotional behavioral.

The evaluation report documented that the evaluation group:

- Reviewed current interventions tried in the general education setting and existing classroom based data;
- Reviewed the Student's school record;
- Conducted various assessments;
- Conducted classroom observations on November 9 and 30, 2021;
- Reviewed a developmental history questionnaire;
- Conducted interviews with Parent, Student, and teachers;
- Student's Parent and general education teacher completed the "BASC-3 (Behavior Assessment System for Children); BRIEF-2 (Behavior Rating Inventory of Executive Function); SSIS SEL (Social-Emotional Learning); and ABAS-3 (Adaptive Behavior Assessment System) to assess Student's abilities"; and,
- Principal completed the BRIEF-2 and SSIS SEL tests to ensure the evaluation incorporated multiple perspectives.

¹ Emails from the school psychologist indicated that part of the reason the team met a second time to review the evaluation was that the school psychologist "proposed the identification of Autism for [Student and], the [District] district policies* require medical documentation in order to do so." Thus, they met again to discuss eligibility under the developmental delay category. (The school psychologist did note that the issue of eligibility under autism generally was being discussed by the school psychologist team in the district.) The school psychologist further stated that in the District, they did not need to "include academic goals regardless of identification area" and "thus, we can partner to focus on goal development in other areas of need. In plain language, we will not need to include cognitive, reading, writing, or math goals."

In its response the District noted that, "During the evaluation, the District was unable to accurately score data from the Student's communication skills, reading skills, written language skills, and math skills assessments because of her social-emotional and communication interferences." So, the District stated the evaluation group reviewed work samples and classroom observations to determine eligibility for services in those areas.

5. The complaint investigation timeline began January 10, 2022.
6. In her complaint, the Parent alleged that the District did not follow special education procedures, specifically by "improperly and inaccurately testing [the Student]." The Parent also raised concerns that the Student's behavior was not addressed when the Parent was called on more than one occasion to pick the Student up early.²
7. On January 23 and 24, 2022, the Student's general education and special education teachers emailed. The general education teacher stated that the draft IEP had the Student receiving "30 minutes a week" of special education services and expressed concern that this was not enough, and that the Student was struggling. The teacher indicated the Student needed 1:1 support. The special education teacher responded that she would talk to her supervisor about a 1:1, but that "currently we don't have the any [sic] extra time to add more into her minutes." The special education teacher also stated that they needed to complete a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) and have this "implemented for a period of time before a 1:1 is able to be recommended."
8. Also, on January 24, 2022, the Student's IEP team met and developed the Student's initial IEP. The IEP included annual goals in adaptive behavior (organization, self-advocacy), communication ("WH" questions, following directions/concepts, expanding utterances, vocabulary), and social/emotional (aware of environment, transitions). The Student's IEP provided the Student with the following specially designed instruction:
 - Social emotional/behavioral: 15 minutes, 5 times a week (to be provided by special education provider in the general education classroom)
 - Adaptive: 15 minutes, 5 times a week (to be provided by special education provider in the general education classroom)
 - Communication: 30 minutes, 3 times per month (to be provided by a speech language pathologist (SLP) in the special education classroom)

The IEP indicated the Student would spend 98.7% of her time in the general education setting and needed "pictorial communication books, highly structured and consistent classroom schedules, picture schedules, [and] warnings prior to transitions." The IEP also noted the team would begin an FBA.

9. In its response, the District stated that the initial evaluation was:

² OSPI notes that emails document one occasion where the Parent was called to pick the Student up, but that District staff worked to stop this practice. Additionally, emails document that one strategy used was to call the Parent to have the Parent deescalate or support the Student over the phone.

Sufficient to support development of an initial IEP for Student. When behaviors of concern persisted following implementation of that initial IEP, the District followed up with a [FBA] to provide the IEP team with additional information regarding Student's behaviors. That additional data supported development of a behavior intervention plan.

10. On January 24 and 25, 2022, the special education teacher and a District behavior specialist emailed regarding an FBA and observations. The special education teacher asked whether the FBA paperwork, observations, or data collection had begun as she did not have "time to do observations." The behavior specialist stated that he did an observation and took data "to inform recommendations" and not for a "formal FBA," but that he could assist when school staffing stabilizes.
11. On April 19, 2022, the Student's general education teacher emailed the Student's special education teacher to check in on doing an assessment to assess the Student's need for one-on-one support. The teacher stated, "we are still really struggling and needing more support in the classroom" and that the Student had been getting "about 15 minutes of support here and there."
12. In May 2022, the District initiated an FBA and on May 31, 2022, the Student's IEP team met to discuss the FBA.³

The FBA indicated the Student benefited from repetition and one-on-one support and listed the Student's interests and motivations. The FBA indicated that the target behaviors were elopement, "including running around room, climbing on furniture or people, which often can lead to elopement outside of the classroom" and that these behaviors happened throughout the day, in all settings daily, and required 1:1 support. Other target behaviors were task avoidance, including "coloring, spinning in teacher chair, playing with...around the room," and these behaviors also occurred throughout the day in all settings. The FBA noted the Student "tends to have difficulty with managing transitions and staying focused on a task/activity without direct 1:1 prompts from adults in the classroom."

As part of the FBA, the Student was observed in her general education class. The FBA indicated a BIP was needed.

13. On May 31, 2022, the Student's IEP team developed a BIP to address the target behaviors of elopement and task avoidance. The BIP included information about setting events and antecedents, the target behavior, and typical consequences; and provided alternative replacement behaviors, and numerous strategies.
14. On June 3, 2022, the general education teacher emailed a District program specialist and described numerous interventions and strategies they had been using throughout the school year with the Student. The teacher stated that she had been trying different strategies

³ The District indicated the FBA was discussed that the initial IEP meeting with the Parent, and that consent was not required for an FBA. The District cited a 2nd Circuit court case for this position, arguing that an FBA standing alone is not an evaluation, and therefore does not require parent consent.

throughout the year, and that “none of these strategies have been successful at consistently keeping her from eloping in the classroom or getting back to class after eloping” or engage in/complete classroom tasks.

15. Notes from a phone call with the Parent on June 7, 2022, indicated the Parent and District discussed the Student’s strengths and continuing concerns—eloping, climbing on furniture, inappropriate language, and work avoidance. The notes indicated they discussed numerous strategies the team was implementing in the classroom, and that the Student had improved in her communication skills.
16. On June 13, 2022, the District reported on the Student’s progress on her IEP goals. The progress reporting noted the Student made some amount of progress on all her goals, between a mastery level of “2” and “4.”
17. The District’s 2021–2022 school year ended June 16, 2022.

CONCLUSIONS

Issue: Evaluation of the Student – The Parent alleged that the District did not follow special education procedures, specifically by “improperly and inaccurately testing [the Student],” and raised concerns that the Student’s behavior was not addressed when the Parent was called on more than one occasion to pick the Student up early.⁴

Here, the Student was evaluated for special education eligibility in fall of 2021 and the evaluation group met on December 8 and 17, 2021, to determine eligibility. The evaluation group determined the Student was eligible for special education services under the category developmental delay and the evaluation report documented recommendations that the Student receive specially designed instruction in reading, math, written language, adaptive behavior, communication, and social/emotional behavioral. There is no indication that the Parent disagreed with the evaluation at the time it was completed.⁵

OSPI notes that because OSPI received and opened the Parent’s complaint on January 9, 2023, the applicable period for investigation began on January 10, 2022, after the completion of the Student’s initial evaluation. Thus, the sufficiency of the initial evaluation is not at issue here;

⁴ Regarding the Student being picked up early, emails document one occasion where the Parent was called to pick the Student up, but that District staff worked to stop this practice. Additionally, emails document that one strategy used was to call the Parent to have the Parent deescalate or support the Student over the phone. There is no indication that the Student was regularly sent home early.

⁵ The District did acknowledge that it was unable to accurately score data from the Student’s communication, reading, written language, and math skills assessments because of her “social-emotional and communication interferences.” This did not prevent the group from finding the Student eligible for special education, as the evaluation group additionally reviewed work samples and classroom observations to determine eligibility for services in those areas.

instead, the relevant question is whether the District addressed the Student's behavior following the initial evaluation, including considering the FBA conducted by the District.

On January 24, 2022, the Student's IEP team developed her initial IEP. The Student's January 24, 2022 IEP included annual goals and services in adaptive behavior, communication, and social emotional/behavioral. In conjunction with the IEP meeting, the general and special education teachers discussed via email that the Student likely needed 1:1 support and that they would need to complete an FBA and develop a BIP, and implement the IEP and BIP "for a period of time before a 1:1 is able to be recommended." The District stated that while the initial evaluation was sufficient, the Student's behaviors of concern persisted following the implementation of the initial IEP and thus, the District conducted an FBA.

Ultimately, on May 31, 2022, the Student's team met to review and discuss the FBA, which indicated the Student required a BIP and 1:1 support. The same day, the Student's IEP team developed a BIP. Emails from the Student's teachers indicated that the Student's behaviors continued to be a challenge throughout the end of the year, and that the teachers had been trying different strategies. At the same time, the Student's progress reporting indicated that she made some, although varied progress on her goals. Overall, OSPI finds that there is no indication that the District improperly or inaccurately tested the Student. The District, when the Student's behaviors of concern continued after the initial IEP was implemented in January 2022, appropriately conducted an FBA, and developed a BIP.

However, there does seem to have been a delay in conducting the FBA and the District did not obtain the Parent's consent for the FBA. And there is some indication that staffing shortages impacted the delay in conducting the FBA. The January 2022 IEP noted the team would begin an FBA; however, the FBA was not completed until the end of May 2022—approximately four months later. And, at the time the IEP was developed, the special education teacher and District behavior specialist emailed, and the behavior specialist stated that he could assist with an FBA when school staffing stabilizes. OSPI notes that the U.S. Department of Education, Office of Special Education Programs (OSEP) considers an FBA to generally be an individualized evaluation of a child and thus, like other evaluations, consent must be obtained.⁶ And OSEP has stated that once the need for a reevaluation is identified, a district must act "without undue delay and within a reasonable period of time;" and that waiting several months to seek consent is generally not reasonable. Here, the FBA was discussed in January 2022 but not completed until the end of May 2022, several months later, and without consent. Thus, on this point, OSPI finds a violation. The District will be required to develop and distribute written guidance related to FBAs and consent, and convene the Student's IEP team to discuss whether different or additional behavior supports are needed due to the delay in conducting the FBA and developing the BIP.

⁶ OSPI notes that Washington is in the 9th Circuit and thus the case from the 2nd Circuit, cited by the District, is not binding in Washington; further OSEP's guidance continues to state that an FBA is a type of individualized evaluation to assist in determining whether the child is, or continues to be, a child with a disability. While OSPI acknowledges that guidance may change in future as legal precedent evolves, this decision is based on current 9th Circuit law and guidance.

Finally, while not seemingly the focus of the Parent’s complaint, OSPI does note concerns with the development of the IEP. The Student’s evaluation report indicated the Student had a need in and recommended she receive specially designed instruction in reading, math, written language, adaptive behavior, communication, and social/emotional behavioral. However, the Student’s initial IEP only included services in social emotional/behavioral, adaptive, and communication. The IEP did not include services in reading, math, or written language, and the IEP included no explanation for the failure to include services in these areas. The District had no explanation for this either. The only explanation is in an email from the school psychologist, which stated in part that, in the District, they did not need to “include academic goals regardless of identification area” and “thus, we can...focus on goal development in other areas of need. In plain language, we will not need to include cognitive, reading, writing, or math goals.”

OSPI finds this problematic. The Student’s evaluation report indicated the Student had a need in academic areas in addition to behavior and communication; thus, all these areas should have been included in the Student’s IEP, or if the team determined otherwise, the prior written notice should have contained a reasonable explanation as to why certain areas did not need to be addressed. While not every eligibility category necessitates academic goals, if an evaluation indicates a student has disability-related needs in academic areas, these areas should be addressed in the IEP. Thus, at the above ordered IEP meeting, the team will discuss whether the Student requires services in these areas and whether any compensatory education services are required, if these services should have been provided between January 2022 and the end of the 2021–2022 school year.

CORRECTIVE ACTIONS

By or before **March 31, 2023** and **April 21, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP Meeting

By or before **March 24, 2023**, the Student’s IEP team will meet to discuss the following:

- Whether different or additional behavior supports are needed due to the delay in conducting the FBA and developing the BIP;
- Whether the Student requires services in reading, math, or written language; and,
- Whether any compensatory education services are required if these services should have been provided between January 2022 and the end of the 2021–2022 school year.

By or before **March 31, 2023**, the District will provide OSPI with the following documentation: a) any relevant meeting invitations, b) a prior written notice, summarizing the IEP team’s discussion and decisions; c) the plan for compensatory education services if determined appropriate; and d) any other relevant documentation.

DISTRICT SPECIFIC:

Written Guidance

By **April 21, 2023**, the District will ensure that the following individuals receive written guidance on the topics listed below: special education administrators, the principal, the assistant principal, special education certificated staff (teachers), and behavior specialists, at the school that the Student was enrolled in during the 2021–2022 school year. The guidance will include examples and discussion of best practices.

- Reevaluation timelines and procedures, including FBAs. WAC 392-172A-03015 and -03020.
- Requirement to obtain parent consent for reevaluations. WAC 392-172-03015.

By **March 31, 2023**, the District will submit a draft of the written guidance to OSPI for review. OSPI will approve the guidance or provide comments by April 7, 2023.

By **April 21, 2023**, the District will submit documentation that all required staff received the guidance. This will include a roster of the required personnel. This roster will allow OSPI to verify that all required staff members received the guidance.

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 6th day of March, 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.)