

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 20-118B**

### **PROCEDURAL HISTORY**

On September 22, 2020, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Prosser 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 September 24, 2020, 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 October 12, 2020, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply with any information he had that was inconsistent with the District's information.

On October 13, 2020, OSPI received additional information from the Parent. OSPI forwarded that information to the District on the same day.

On October 25, 2020, OSPI received the Parent's reply. OSPI forwarded that reply to the District on the same day.

On October 27, 2020, OSPI requested that the District provide additional information, and the District provided the requested information on October 29, 2020. OSPI forwarded the information to the Parent on October 29, 2020.

On October 30, 2020, OSPI received an additional reply from the Parent. OSPI forwarded a copy of this additional reply to the District on November 3, 2020.

On November 9 and 10, 2020, OSPI requested that the District provide additional information, and the District provided the requested information on November 10, 2020. OSPI forwarded a copy of the requested information to the Parent the same day.

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

### **ISSUES**

1. Did the District follow proper procedures for responding to the Parent's May 2020 request to access certain educational records of the Student?
2. Did the District follow IEP development procedures in determining not to create an IEP for the Student following the completion of the functional behavioral assessment of Student in or around late February or early March 2020?

3. Did the District follow proper parent participation procedures in considering the Parent's request, as of late February or early March of 2020, to reconsider whether the Student required an IEP that focused on reading skills?

### **LEGAL STANDARDS**

**FERPA:** The Family Educational Rights and Privacy Act of 1974 (FERPA) protects parents' privacy interests in their children's education records. FERPA gives parents the right to inspect and review their children's education records, the right to request amendment of those records, and the right to have some control over the disclosure of information from those records. FERPA applies to all students, including those receiving special education and related services. Parents have the right to review their children's education records on matters regarding identification, evaluation, educational placement, and the provision of FAPE. 34 CFR §§300.613, 300.618, 300.622; WACs 392-172A-05190, 392-172A-05215, and 392-172A-05225. FERPA is enforced by the Family Policy Compliance Office (FPCO) within the United States Department of Education's Office of Management. FPCO is responsible for investigating, processing and reviewing FERPA violations and complaints. 20 U.S.C. §1232(f) and (g), (1234); 34 CFR §99.60.

As a general rule, parents do not have a right under FERPA to review and inspect documents that are not education records, that is, information that is not personally identifiable to the parents' child. 20 USC §1232g(a)(4); 34 CFR §99.3.

**Parents' Access Rights to Student Records:** Districts must permit the parents of a student eligible for special education to inspect and review, during school business hours, any educational records relating to the student that are collected, maintained, or used by the district. The district must comply with a request promptly and before any meeting regarding an individualized education program (IEP), hearing, or resolution session relating to the identification, evaluation, educational placement of the student, or provision of a free appropriate public education (FAPE) to the student, including disciplinary proceedings. The district must respond in no more than 45 calendar days after the request has been made. The right to inspect and review educational records includes: the right to a response from the district to a reasonable request for explanations and interpretations of the records; the right to request that the district provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising their right to inspect and review the records; and the right to have a representative of the parent or adult student inspect and review records. 34 CFR §300.613; WAC 392-172A-05190.

**Eligibility Under IDEA:** A student eligible for special education means a student who has been evaluated and determined to need special education because he or she has a disability in one of the following eligibility categories: intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an emotional behavioral disability, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, multiple disabilities, or, for students aged three through eight, a developmental delay and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through

education in general education classes with or without individual accommodations. 34 CFR §300.8(a)(1); WAC 392-172A-01035(1)(a). A child with a disability may seek to qualify for special education benefits under more than one eligibility category. *E.M. by E.M. and E.M. v. Pajaro Valley Unified Sch. Dist.*, 114 LRP 31486 (9th Cir. 2014). A student's eligibility category does not determine services. *In the Matter of Issaquah School District*, 103 LRP 27273, OSPI Cause No. 2002-SE-0030 (WA SEA 2002).

**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). The IDEA does not specify who is qualified to conduct an FBA, for example there is no requirement that a board-certified behavior analyst, or any other specific individual, conduct an FBA. *Letter to Janssen*, 51 IDELR 253 (OSERS 2008).

**Positive Behavioral Interventions:** Positive behavioral interventions are strategies and instruction that can be implemented in a systematic manner in order to provide alternatives to challenging behaviors, reinforce desired behaviors, and reduce or eliminate the frequency and severity of challenging behaviors. Positive behavioral interventions include the consideration of environmental factors that may trigger challenging behaviors and teaching a student the skills to manage his or her own behavior. WAC 392-172A-01142.

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

**Parent Request for IEP Meeting:** When a parent or district believes that a required component of a student's IEP should be changed and requests an IEP meeting, the district must conduct an IEP meeting if it believes that the change may be necessary to ensure the provision of FAPE.

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

## **FINDINGS OF FACT**

### **2019 -2020 School Year**

1. During the 2019-2020 school year, the Student was in second grade and attended a District elementary school. At the start of the school year, the Student was not eligible for special education services.
2. The District's 2019-2020 school year began on August 27, 2019.
3. On January 15, 2020, after the Student had been evaluated in the areas of behavior, academic, cognitive adaptive, and social/emotional, the evaluation team met to discuss the evaluation results. The evaluation team included the following participants: principal, general education teacher, school psychologist, special education teacher, director of special education (director), school security guard, Parent, and the Student's mother. The team determined the Student was not eligible for special education.

The evaluation described the following:

- Social/Emotional: The Social Skills Rating Scale (SSRS) identified desirable prosocial skills inconsistently demonstrated by the Student in the school setting.
- Adaptive: [Student's] overall Adaptive Behavior Composite score is 118, somewhat above the normative mean of 100...and at a moderately high level when compared to others her age. The percentile rank for this overall score is 88. [Student's] score for the Socialization domain reflects her functioning in social situations. Her Socialization standard score is 86. The percentile rank is 18, this domain is a relative weakness for [Student], but adequate when compared to others her age.
- Behavior:
  - Parent Rating Scale: Based on Parent's rating of Student using the BASC-3 Parent Rating Scales on 11/19/19. Results indicate overall Average range concerns related to externalizing behaviors, internalizing behaviors, and adaptive skills, particularly within the home setting. However, within the Externalizing Behaviors Index, the Aggression section is elevated to the At-Risk level...that may identify a significant problem that may not be severe enough to require formal treatment or may identify the potential of developing a problem that needs careful monitoring. Additional clinical interviewing and history-taking is likely warranted in order to determine the functions of Student's aggression, as well as how it fits into her overall clinical picture.

- Teacher Rating Scale: The Behavioral Symptoms Index (BSI) measures the overall level of behavioral problems...that is similar to other children her age. However the Externalizing Problems index is At Risk range primarily due to the Aggression score...that is in the Clinically Significant range suggesting a high level of maladjustment. Student's teacher reports that Student displays a high number of aggressive behaviors. The teacher reports that Student almost always loses her temper too easily and often bullies, threatens to hurt, and hits other children.
- Cognitive: Student's Full-Scale IQ score of 105 is within the average range of general intelligence. Composite scores indicated high average range Verbal Comprehension (113), very high range Visual Spatial (122), average range Fluid Reasoning (91) low average range Working Memory (88), and very high range Processing Speed (123). Comparably the Cognitive Proficiency Index (CPI) placed Student's abilities to efficiently process information in the service of learning, problem solving and higher order reasoning...within the average range. Scores suggests that the Student's cognitive abilities are comparable to abilities that facilitate cognitive processing efficiency.
- Academic: Woodcock Johnson Tests of Achievement Edition (WJ -IV Ach) standard scores are provided with a mean of 100 and a standard deviation of 15 with 90 to 110 often considered the average range. Among the WJ-IV achievement measures, Student's standard scores are:
  - Basic Reading skills = 87, low average range
  - Reading Comprehension = 89, low average range
  - Reading Fluency = 86, low average range
  - Math Calculations = 99, average range
  - Math Problem-Solving = 100, average range
  - Written Expression = 125, superior range
- Observation: Student was extremely attentive, followed instructions very well, raised her hand when appropriate, responded to praise, kept her hands to herself, socialized with peers appropriately, and worked independently. Student's behavior was not significantly different from others in the classroom. On the playground, the Student played well with friends and the group of younger children that was led by the adult paraeducator. It was noted that Student had somewhat of an overbearing posture when she pointed her finger in the face of a female friend on the playground and said something to her during their game of tag. Distance prevented this observer from hearing what was said, but Student's dominant body posture was suggestive of some type of strong feelings. Also, of note was that the Student did most of the chasing during tag in a dominant manner.<sup>1</sup>

The evaluation report noted the Student did not meet eligibility criteria, but did not include a summary of "qualifications and functioning" or an explanation of why the Student was not eligible for special education.

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<sup>1</sup> The last page of the evaluation was the observation section; there was no summary of findings. It is also worth noting that, per SECC 19-86, the Student was referred for an initial evaluation after several behavioral incidents at the beginning of the 2019-2020 school year, after the principal filled out a "Student Concern Form" that noted several potential "home/environmental factors" that may have been contributing to the Student's "aggressive outbursts" and stated there had been "three major outbursts this year. Two of the outbursts came on two consecutive days." During these outbursts, the Student "will not respond to verbal cues or talk with staff members. She becomes agitated and physical with her peers, staff and school property."

4. According to the District's response to this complaint, at the evaluation meeting, the Student's mother noted the Student had been diagnosed with attention deficit hyperactivity disorder (ADHD) and the group discussed. Information about the ADHD diagnosis was not included in the evaluation report.
5. Also, on January 15, 2020, the District issued a prior written notice, refusing to initiate an eligibility category for the Student.<sup>2</sup> The notice stated the evaluation team "will not qualify [Student] for placement in special education at this time," and that the Student "is better served in a general education environment." The notice did not include any other options considered or reason alternative options were rejected. The notice also stated the actions taken were based on the evaluation and that a behavior plan is recommended through the District.
6. In February 2020, a board-certified behavior analyst (BCBA) completed a functional behavioral assessment (FBA) and report for the Student. The report stated the Student had a medical diagnosis of ADHD, but is not currently on an individualized education program (IEP).<sup>3</sup> The FBA stated:

[Student] was recently tested in the areas of academics, behavior, and cognitive, but was declined an IEP due to being on target for academics. She has received both in and out of school suspensions. Her parents recently divorced and her father remarried and her mother is due to be married this summer. Between the divorce and new step parents, there has been a lot of life transitions and change for [Student].

Behaviors of Concern: Physical (hitting, kicking, pushing, biting, scratching or pinching a peer or adult) and verbal (yelling, name calling, using profanity, screaming and threats to harm others) aggression, property destruction (hitting windows or walls forcefully, tearing/breaking property and throwing items).

[Student] was observed on February 10, 2020, in her classroom and on the playground. [Student] appeared to follow the instructions and routines of the classroom without difficulty. Her teacher...provided regular work tasks, but they were very long in duration and required students to be independent and self supporting. [Student] appeared to enjoy her table mates and easily smiled and talked with them. During recess, [Student] appeared to enjoy tagging along with other children, although at times appeared to be on the fringes of the play group, not completely incorporated into the game.

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<sup>2</sup> Based on documentation provided by the District, the prior written notice was filled out by hand at the time of the evaluation team meeting, and while it stated the actions were set to take place on January 15, 2020, the top portion of the notice, including to whom the notice was provided and the date on which it was provided, were blank.

<sup>3</sup> OSPI notes that this indicates the Student may have a qualifying disability, but two other determinations need to be made to determine if a student is eligible for special education: does the disability negatively impact the Student's ability to make progress in the general education curriculum (adverse educational impact); and does the Student require specially designed instruction to overcome this impact.

The report also included an interview and records review section, which included the following information, summarized in part:

- Student's mother stated Student may have some auditory sensitivity and processing difficulties in the form of difficulty following instructions, responding to her name, and dislike of certain loud sounds.
- Recent home life changes may have made things more difficult for her as evidenced by increased behavior challenges. The general education teacher reported that Student usually starts the week off well behaviorally, but as the week progresses and she gets closer to leaving her mother's home to go stay with Parent on Friday, her behavior begins to deteriorate. The general education teacher also reported that many difficulties arise when there are substitutes.
- The security guard is most often tasked with taking Student from the escalated situation and helping her to calm down. He indicated Student should not get to calm down with games and that he believed Student could turn on and off her behavior with self control. This idea was reiterated with others interviewed.
- The security guard also stated other students were afraid of Student because she gets physically aggressive with many peers. The school counselor stated he wanted to organize a social skills group for the Student but there are not currently peers well suited for such a group. It was reported when Student was escalated, the adults around her tried to placate or use threats (e.g., offering food, threatening to take away things Student likes, offering escape to play games). The report also provided notes on trauma and ADHD, and the impact of both on behavior.

The FBA findings further included:

Observations and interviews indicated a function of attention, escape, and tangible for the behaviors of physical and verbal aggression and property destruction.

...

Escape (from anxiety of other strong emotions: fear, disappointment, change, etc.) As [Student] becomes anxious, emotions become overwhelming and send [Student] into stress overload where she is engaging in fight, flight, freeze behavior (which is not logically controlled). She appears to have no adult buffers to recognize (and name) the emotions and help her through her difficult emotions before it escalates she ends up engaging in dangerous destructive behaviors...She also has anxiety related to changes in familiar routine and people as evidenced by extreme reactions to substitutes and home changes.

Escape (from negative peer interaction) [Student] seems to have difficulty social problem solving and perspective taking...She may intercept peer behavior incorrectly or not attempt to solve social problems. She also has inconsistent social skills So when [Student] wants to interact with peers it can end up being a negative interaction and she uses the tools she has (physical aggression and verbal aggression) to navigate the situation.

Attention (from safe adults) When [Student] escalates [the counselor] or [the security guard] will take her to calm down. These are the two adults [Student] feels safe with, so when she becomes escalated (all behaviors) and needs adult help to calm, these are the people she wants and needs. She will need ongoing emotion regulation support from adults. All adults in her life should intentionally work toward developing strong, safe, supportive relationships with her.

Sensory (avoidant and seeking)...Any sensory needs should be considered when developing coping and calming strategies...

Trauma: The below are possible times when [Student] was dealing with high levels of stress and trauma may develop. Counseling services are recommended.

- Parent divorce
- Negative parent to parent interactions
- Severe behavior at school

The FBA also listed proactive approaches, recognizing the Student's precursors, and additional recommendations:

- Provide a daily schedule in the classroom;
- Shorten classroom tasks and activities;
- Incorporate emotional regulation;
- Ensure teachers are having 4:1 positive to negative verbal interactions;
- Provide training for staff on trauma, ADHD, autism;
- Implement calming safe spaces for students in class;
- Precursors: Integral in teaching Student to self regulate;
- Precursors: should not be ignored;
- Precursors: Student can be taught to recognize precursors as well;
- Goal in emotional regulation, she has experienced trauma;
- Safe strong adult relationships;
- School provide resources for Student and her mother and for Student and her father to find and attend separate trauma focused family counseling;
- Student should receive individual counseling for trauma and ADHD, otherwise long term positive adjustment and mental health outcomes are poor;
- Goal in perspective taking and social problem solving. Recommended someone with thorough training in teaching teach her these skills;
- Goal in self calming and soothing strategies, rooted in mindfulness possibly; and,
- Goal in recognizing and naming emotions and how they feel.

7. On March 12, 2020, the Washington Governor issued a proclamation, announcing the closures of all public and private K-12 school facilities in King, Snohomish, and Pierce counties through April 24, 2020 (on March 13, 2020, this was extended to all schools in Washington).
8. On March 13, 2020, the District issued an update to District families, in response to the Governor's proclamation, affirming the closure of District school.
9. On March 19, 2020, the evaluation team was scheduled to meet with the Parents to discuss the FBA, but the meeting was rescheduled due to COVID-19 closures.
10. On March 23, 2020, OSPI issued guidance, instructing districts that while school facilities are closed and not providing traditional in-person instruction, education must continue. OSPI's guidance outlined the expectation that "continuous learning" would begin for all students by Monday, March 30, 2020.
11. On April 6, 2020, the Governor extended the March 13, 2020 school facility closure directive through the remainder of the 2019-2020 school year.
12. The District was on spring break from April 6 to 10, 2020.



13. On May 15, 2020, the Parent emailed the director, and copied the District superintendent, and stated, "How soon will we be able to meet (virtually) and discuss [Student's] evaluation and [siblings] transition to middle school. I understand this will probably be two different meetings."

14. On May 18, 2020, the director and Parent exchanged several emails:

- Director sent the Parent an invitation to join a Skype meeting, and stated, "This meeting is to review the Function[al] Behavior[al] Assessment (FBA) that was conducted and to gather ideas for a positive behavior support plan."
- Parent to director: "With new diagnosis and the FBA isn't it possible that [Student] qualifies for an IEP?"
- Director to Parent: "What diagnosis has she gotten since our qualification meeting?"<sup>4</sup>
- Parent to director: "From my understanding she has a diagnosis for ADHD."
- Director to Parent: "[Student] had [diagnosis for ADHD] at the time of our evaluation meeting."
- Parent to director: At that meeting, the school psychologist said we could only qualify her in one of the academic areas. We all agreed that she didn't need academic services. If she had a diagnosis of ADHD why was that not offered as a way to qualify her under, "other health impairment?"
- Director to Parent: "ADHD is not an automatic qualification for special services. We have to show that it impairs her ability to learn, which it does not. She needs accommodations, not specially designed instruction. Accommodations can be addressed in the positive support plan and/or a 504 plan."
- Parent to director: "It is my understanding that only one of the qualifications is needed for an IEP. [And] ADHD falls under other health impairment. And if it isn't interfering with learning then why are we discussing this? Social emotional learning can be added in an IEP."

15. Also, on May 18, 2020, the Student's mother emailed the Parent, director, principal, school psychologist, BCBA, and general education teacher, and stated:

I want to take a moment to say thank you to everyone who has been supporting [Student] throughout this year. I know as we meet next week that the most important thing is that [Student] has the support she needs to be successful in school however that may look. Over the past two months of school being out, [Student] has continued to receive support and counseling through [community agency]. I have invited [Student's] counselor and [behavior intervention support person] to our meeting. This way as we determine the best path forward, [Student] can have support throughout the coming months that will also help address her school needs.

16. Later, on May 18, 2020, the Parent emailed the District superintendent and stated, in relevant part, "I just want to check to make sure it is the district[s] policy right now not to fill records requests."<sup>5</sup>

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<sup>4</sup> The special education director appears to be referring to the January 15, 2020 evaluation meeting, where the team determined the Student was not eligible to receive special education services.

<sup>5</sup> Neither the Parent nor the District provided a record of the Parent's initial record request, so it is unknown if the request was made in writing, orally, or via email. It is also unclear exactly what records the Parent requested. The Parent did state in his complaint that he made his initial records request in May 2020.

17. On May 22, 2020, the administrative assistant to the superintendent emailed the director and stated:

I had reached out...to make sure I was following the law. [Parent] emailed me back today after you and I talked and he said if there is no record for what he is requesting<sup>6</sup>, we just need to tell him that. Also, because this is a student record request (and not a public record request), there is no 5 day response requirement and that we actually have 45 days. I think I will write to him though and tell him there is no record for what he is requesting. Ok? What do you think? [...] I just want to get the letter out early next week to have it take[n] care of.

The director responded, via email, that same day, and confirmed this email would be fine to send to the Parent.

18. On May 27, 2020, the evaluation team, including the Parents, met to review the results of Student's FBA.

19. On June 1, 2020, the Parent, Student's mother, director, principal, general education teacher, and several other District staff members met to develop the Student's behavioral intervention plan (BIP). Emails provided in the District's response indicated that although the Student was not eligible for special education services, they recognized the Student needed accommodations, which could be provided in a "positive support plan and/or 504 plan." The District informed the group that the Student's calming plan would be developed at a later date in conjunction with the Student. During this meeting, the behavior plan was not completed, and another meeting was scheduled.

20. Also on June 1, 2020, the District issued a letter to parents, stating the District board of directors approved a distance learning plan in tandem with a resolution about the number of school days and the number of instructional hours students had received and stated the District planned on concluding the school year on Friday, June 12th.

21. On June 5 and 10, 2020, the Parent, Student's mother, director, principal, general education teacher, and several other District staff members reconvened to finalize the Student's behavior plan, but the plan was not completed at either meeting.

22. On June 15, 2020, the Parent, Student's mother, director, principal, general education teacher, and several other District staff members met to develop the Student's behavior plan. The behavior plan addressed physical aggression, verbal aggression, and property destruction. The plan identified environmental triggers, such as less structured periods of time and substitute teachers. The plan – in draft form – provided a list of alternative behaviors to be monitored and skills to be taught:

- Identify own emotions.
- Communicate frustration/anxiety/anger appropriately

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<sup>6</sup> Neither the Parent nor the District provided a record of the Parent's initial records request, but the Parent stated in his complaint that he wanted "a complete copy of my daughter's records."

- Use I statements
- Check in with buffering adults
- Participate in "Bounce back" program with school counselor

The plan also provided consequences of unwanted behavior: "Student will be held accountable to the same code of conduct as any other student unless specifically detailed in behavior plan."

The BIP also provided reinforcers of desired behavior and methods to ensure consistency of implementation:

- Specific verbal praise
- Daily or weekly schedule on desk
- Provide calming space
- Provide positive choice bingo
- Daily check in and check out
- Daily copy of bingo board
- Daily of weekly updates sent to parents and support staff
- Any incident requiring buffering will be documented on the daily check sheet along with what caused the trigger, where it occurred and details of steps used to help Student deescalate
- BIP will be changed only with the involvement and consent of both parents

The plan also provided a plan for dangerous behavior: crisis prevention intervention will be used by trained staff.

In its response to this complaint, the District stated the plan was not finalized or implemented because there was no agreement between the Parents on next steps and timing.

23. Also on June 15, 2020, the Student's mother emailed District staff members and stated she wanted to clarify that she did not refuse mediation, but that she thinks the best path forward is a behavior plan with a 504 plan now and after 60 days of school starting, the team can reassess the situation. The Student's mother stated, "I believe this will allow the behavior plan to be implemented as well as see how her work with the wrap around with intensive services (WISE) program has impacted her behavior.<sup>7</sup> Because [Parent] and I have different opinions on how to proceed, this prevented mediation from proceeding at this point."

24. Also on June 15, 2020, the Parent exchanged emails with the above listed meeting participants and stated he would like a chance to look over the final plan before giving final approval of the plan, and also stated, "I believe the Student needs an IEP not a 504. I have made the District aware of this disagreement and I will be taking the next steps to resolve this. Since Student's mother has refused to go to mediation I will take the next steps forward which might include filing a citizen complaint with OSPI. I do not agree that the Student should have a 504 but rather an IEP based on IDEA law and reports provided by the school psychologist and BCBA."

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<sup>7</sup> The Wraparound with Intensive Services (WISE) program model provides comprehensive services and support to eligible Medicaid-funded children and youth in Washington who have complex behavioral health needs.

25. On September 16, 2020, OSPI received the Parent's complaint and subsequently opened this investigation. In the Parent's complaint, the Parent stated he "learned since the February meeting that my daughter has been diagnosed with ADHD...and that my daughter was being pulled out for additional reading support for two years above and beyond the general education reading curriculum." The Parent stated he believed the Student "needs an IEP for social emotional support as well as reading."
26. On October 28, 2020, the District stated, as part of its response to this complaint, that the District did not complete a 504 plan for the Student because there was no agreement between the Parents regarding next steps and timing. The District also provided "Building Positive Behaviors Bingo cards", the classroom reward menu, the reward menu for the Student's mother's house and the "Tool-Kit Strategies sheet," and stated these would have been a part of the 504 plan for the Student.
27. Regarding the Parent's record request, the District stated in its response that the Parent "is in possession of the complete special education records up to December 2, 2019." The District also stated "it is still gathering records. There is every intent to meet his request."

## **CONCLUSIONS**

**Issue 1 – Records Request:** The Parent alleged the District failed to follow proper procedures for responding to the Parent's May 2020 request to access certain of the Student's educational records.

The Washington special education regulations address access rights to student records, stating "each participating agency shall permit parents of students eligible for special education to inspect and review, during school business hours, any educational records relating to the student which are collected, maintained, or used by the district or other public agency under this chapter." State special education regulations define a "student eligible for special education" for the purposes of providing a student with procedural safeguard protections (including access to records) as a "student whose identification, evaluation or placement is at issue." WAC 392-172A-01035. Thus, this includes this Student and entitles the Parent to her education records. A district is required to comply with a request promptly and before any meeting regarding an individualized education program (IEP) or hearing or resolution session relating to the identification, evaluation, educational placement of the student or provision of a free appropriate public education (FAPE) to the student, including disciplinary proceedings. The school district shall respond, in no case, more than **forty-five calendar days** after the request has been made. (Emphasis added.)

Here, the Parent made a request for records sometime in May 2020 (the exact date was not provided by either the Parent or District). It is not clear exactly what records the Parent requested. In its response, the District stated the Parent was already in possession of the complete special education records up to December 2, 2019. Thus, OSPI believes the Parent still needs the Student's January 2020 initial evaluation, the functional behavioral assessment, and the behavior plan (currently still in draft form). The District stated in its response that it was "still gathering records" and it has "every intent to meet his request."

Regardless of when in May 2020 the request was made, more than forty-five calendar days have elapsed. There was no documentation provided in the complaint investigation that indicated the Parent had been provided with all the requested records. Thus, OSPI finds the District in violation. The District will be required to clarify with the Parent what records he believes have not been provided and then provide the missing records.

**Issue 2 – IEP Development:** The Parent alleged that the District failed to follow IEP development procedures when it determined not to create an IEP for the Student, following the completion of the functional behavioral assessment (FBA) for the Student.

#### Eligibility & Requirement to Develop an IEP

In order to develop an IEP for a student, a student must first be found to be eligible for special education services. Here, the Student underwent an initial evaluation for special education services in January 2020 and was found not eligible. Thus, before addressing the question of IEP development, OSPI must address the eligibility determination.

When determining eligibility for special education services, a student must be evaluated and have been determined to: 1) have a disability in one of the listed categories; 2) have an adverse educational impact because of the disability; and, 3) have unique needs that cannot be addressed exclusively through education in general education class with or without individual accommodations—in other words, the student requires specially designed instruction. As part of the evaluation for eligibility, the evaluation team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child.

Here, the Student was evaluated in January 2020. The evaluation report noted the Student did not meet eligibility criteria; however, the evaluation report did not include a summary or explanation of why the Student was not eligible for special education. The evaluation report did indicate the Student had inconsistent pro-social skills, was at risk for aggression, and in the areas of cognitive and academic, the Student was between low average and average (although she scored in the superior range for written expression).

Documentation provided by the Parent and the District as part of this complaint show that the evaluation team decided, by consensus, that the Student was not eligible for special education services and would not receive an IEP, but due to concerns regarding her behavior, the Student would have an FBA completed by the BCBA so that a behavioral intervention plan (BIP) could be created and implemented to support the Student. The documentation in the complaint indicated the District agreed the Student needed accommodations, but not specially designed instruction, and that accommodations could be provided through a positive support plan and/or 504 plan.

OSPI notes a flaw in the District's documentation. The prior written notice from the January 15, 2020 evaluation meeting noted the evaluation team did not find the Student eligible for special education and list the reason as: the Student "Student "is better served in a general education environment." This is an incorrect statement with respect to eligibility. Placement in the general

or special education setting has nothing to do with eligibility, as specially designed instruction can be provided in both a general and special education setting. Eligibility, as outlined above, relates to whether the Student has a disability, whether there is an adverse impact, and whether the Student requires specially designed instruction. While the inaccurate prior written notice is not enough to find a violation or overrule the District's eligibility determination, OSPI strongly encourages the District to review eligibility requirements and best practices for how eligibility is explained in the evaluation report and prior written notice. However, because the District found the Student ineligible, there was no requirement to develop an IEP, following the January 2020 evaluation.

#### FBA & Requirement to Develop an IEP

The Student underwent an FBA in February 2020. The FBA noted the Student has recently been evaluated and was found ineligible for special education, although the Student had a medical diagnosis of ADHD. Although the first FBA review meeting was cancelled due to COVID closures, the team met on June 1, 5, 10 and 15, 2020, and completed a draft of a behavior plan for the Student.

The Parent alleged in his complaint that he only became aware of the Student's ADHD diagnosis after the FBA was complete. The Parent alleged that the District erred when it did not consider this additional information in determining whether the Student qualified for an IEP. Thus, the question becomes whether the FBA was a sufficient evaluation to show the Student was eligible for special education, or whether the FBA should have triggered a new referral for an initial evaluation for special education services.

As to the ADHD diagnosis, and whether the District failed to implement an IEP after conducting the FBA, it is important to note that the Student may have had a qualifying disability at the time of the FBA, but two other determinations need to be made: that the disability negatively impacts the Student's ability to make progress in the general education curriculum and that the Student requires specially designed instruction to overcome this impact. Additionally, the District asserted the Student's mother brought up the ADHD diagnosis at the evaluation meeting in January 2020 and that the group discussed. Although, it is important to note that the evaluation report did not include any information about ADHD.

The January 2020 evaluation included assessments of an observation regarding the Student's behavior. The evaluation did note the Student had inconsistent pro-social skills and was at risk in the area of aggression. The observation report for the Student's January 2020 evaluation stated the Student was observed to be extremely attentive in class, followed instructions very well, raised her hand when appropriate, responded to praise, kept her hands to herself, socialized with peers appropriately, and worked independently. The Student's behavior was not significantly different from others in the classroom. The BCBA stated in her observation in the FBA that the Student appeared to follow the instructions and routines of the classroom without difficulty and that the Student appeared to enjoy her table mates, easily smiled and talked with them, and enjoyed tagging along with other children during recess, although at times appeared to be on the fringes of the play group. The FBA does not change the conclusions of the evaluation or contain

information that shows new or different behaviors between the January 2020 evaluation and February 2020 FBA. The BCBA considered the Student's behavior in the general education setting and determined the Student's ability to make progress in the general education curriculum did not appear impacted by the Student's behaviors, which may or may not manifest, in whole or in part, due to the Student's ADHD diagnosis.

Here, the District did not violate the IDEA in determining not to create an IEP for the Student following the completion of the FBA because no determination was made that the Student was now eligible for special education services. Thus, OSPI finds no violation as the Student was not eligible for special education and thus, the District was not obligated to create an IEP. If the Parent continues to disagree with the eligibility determination, he may request a due process hearing or the Parent has the right to obtain an independent educational evaluation (IEE) of the Student at public expense if they disagree with the District's evaluation.

**Issue 3 – Parent Participation:** The Parent alleged that the District failed to follow proper procedures in considering his requests after the FBA was conducted, to reconsider whether the Student required an IEP that focused on reading skills. The Parent alleged in his complaint that he only became aware of the Student's ADHD diagnosis, and the fact that she had been receiving additional reading support for two years prior to the evaluation, after the FBA was complete.

The Student's initial evaluation was completed, and reviewed by the evaluation team on January 15, 2020, at which time the team, including both Parents, agreed the Student was not eligible for special education. The FBA was intended to inform the development of a behavior plan, which was to be provided to the Student as an accommodation or a 504 plan. The FBA here did not consider or reveal new information regarding the impact of the Student's ADHD diagnosis. The FBA also was focused on the Student's behavior and did not directly address the impact of prior additional reading support on her ability to access general education reading curriculum. While the Parent alleged he first learned about the Student's ADHD diagnosis and additional reading support after the FBA meeting, and though the initial evaluation report did not explicitly reference ADHD and the prior reading support, the Student was sufficiently evaluated in the areas of behavior and reading. For example, the evaluation used a social skills rating scale, assessed adaptive behavior, used a parent and teacher rating scale for behavior, assessed the Student's cognitive ability, and assessed the Student's academic areas, including basic reading skills, reading comprehension, and reading fluency. Best practice would have been to discuss prior supports the Student received, including those in reading, in the evaluation, especially given that the Student's reading academic scores were in the low average range. The failure to address the previous reading supports specifically and the failure to add ADHD to the report do not render the evaluation insufficient.

However, given that the Parent asked the District to reconsider the Student's eligibility on May 18, 2020, and given that the two elements he raised (ADHD and prior reading support) were not addressed in the initial evaluation, OSPI believes the District should have treated this as a new referral for a special education evaluation. While this was not necessarily "new" information, it is not clear these specifics were addressed in the original initial evaluation. At minimum, the District should have followed referral procedures and made a determination whether this information

from the Parent warranted a new evaluation. The District should have documented in a prior written notice, whether or not it would initiate a new evaluation, which could have been a place to document that these factors were addressed in the original initial evaluation if the District asserts that they were.

Thus, while the District was not obligated to create an IEP based on the Parent's concerns (as again, the Student was not eligible for special education), the District was obligated to allow the Parent to participate in educational planning for the Student and thus must properly respond to his concerns. Here, that should have been formal documentation of the Parent's concerns and whether they necessitated a new evaluation or why a new evaluation was not necessary. This is a violation of the IDEA.

### **CORRECTIVE ACTIONS**

By or before **December 9, 2020, December 11, 2020, and December 18, 2020**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

By or before **December 2, 2020**, the District will clarify with the Parent what records the Parent believes have not been provided.

By or before **December 9, 2020**, the District will provided the Parent with the requested records, to the extent those records constitute the Student's education records under the Family Educational Rights and Privacy Act (FERPA).

By or before **December 11, 2020**, the District will provide OSPI with all relevant documentation showing its completion of this portion of the CAP.

#### **DISTRICT SPECIFIC:**

By **December 16, 2020**, the District will ensure that the following individuals receive written guidance on prior written notice (WAC 392-172A-05010): special education administrators, the principal, the assistant principal, and special education-certified staff, including educational staff associates (ESAs)<sup>8</sup>, at the school that the Student was enrolled in during the 2019-2020 and 2020-2019 school years.

The guidance will include examples. By **December 9, 2020**, the District will submit a draft of the written guidance to OSPI for review. OSPI will approve the guidance or provide comments by December 11, 2020.

By **December 18, 2020**, 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.

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<sup>8</sup> ESAs include school psychologists, physical therapists, occupational therapists, speech language pathologists, school counselors, school nurses, and other service providers.



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.

**REMINDER**

OSPI notes in reviewing documentation provided by the District in response to this complaint that despite holding four meetings to complete the BIP, a finalized plan was not issued because the Parents could not agree on next steps. OSPI reminds the District that if team members are unable to agree on a course of action, the District may take action on behalf of a student after efforts to obtain parents' input.

Dated this \_\_\_\_ day of November, 2020

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.)