

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-61

PROCEDURAL HISTORY

On April 25, 2023, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from a DCYF Social & Health Program Consultant (Complainant) regarding a student (Student) attending the **[REDACTED]** School District (District). The Complainant alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On April 27, 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 May 11, 2023, the District requested an extension of time to respond to the complaint. OSPI granted the extension to May 19, 2023.

On May 19, 2023, OSPI received the District's response to the complaint and forwarded a redacted¹ version of the response to the Complainant on May 23, 2023. OSPI invited the Complainant to reply.

On June 1, 2023, the Complainant requested an extension of time to reply to the District's response. OSPI granted the extension to June 15, 2023.

On June 2, 2023, the Complainant provided a release of information signed by the Student's guardian, giving OSPI permission to share the Student's records with the Complainant. OSPI sent the Complainant a copy of the unredacted District response the same day.

On June 12, 2023, OSPI requested additional information from the District and the District provided the requested information on June 15, 2023. OSPI forwarded the information to the Complainant the same day.

On June 15, 2023, OSPI received the Complainant's reply. OSPI forwarded that reply to the District on June 16, 2023.

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

ISSUES

1. Whether, since November 2022, the Student's individualized education program (IEP) team improperly shortened the Student's school day?

¹ Since OSPI had not received a signed release from the parent/guardian as of May 19, 2023, giving us permission to send the Complainant copies of education records for the Student, OSPI initially provided a redacted version of the District's response.

2. Whether the Student's IEP team appropriately address his behavior and transportation needs since November 2022?

LEGAL STANDARDS

IEP Implementation: At the beginning of each school year, each district must have in effect an individualized education program (IEP) for every student within its jurisdiction served through enrollment who is eligible to receive special education services. A school district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a [student with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

Program Length: Students who receive special education should be allowed to participate in a district's educational programs and services to the same extent as their non-disabled peers, consistent with their rights under IDEA. Any decision to limit or restrict their access and participation must be made by their IEP team, based solely on any adjustments necessary due to their disability and/or unique needs. 34 CFR §300.114; WAC 392-172A-02050. "Districts may not condition a student's return to a full school day on a district's staffing needs. Instead, districts must make decisions based on a student's right to be in [their] least restrictive environment." SECC 15-84 (2015). If a student receiving special education services cannot attend school a full school day, the reason must be documented in his or her records and addressed in the student's IEP. 34 CFR §300.320; WAC 392-172A-03090. *See also Shoreline School District No. 412*, 55 IDELR 178 (OCR 2010).

Districts should not use a shortened school day as a form of punishment or as a substitute for positive behavior strategies and supports or a behavioral intervention plan (BIP). Instead, an IEP team should consider developing an IEP that includes a BIP that describes the use of positive behavioral interventions, supports, and strategies reasonably calculated to address the student's behavioral needs and enable the student to participate in the full school day. Even when the parents and the district agree to incorporate a shortened school day as part of a student's IEP due to behavioral needs, IEP teams must still follow procedures for developing or amending an IEP. *Tips from the Special Education Division: Shortened School Days* (OSPI, February 2023).

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

they would be appropriate for a child. For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP team has decided that a BIP is appropriate, the IEP team must include a BIP in the child's IEP to address the behavioral needs of the child. *Questions and Answers on Discipline Procedures* (OSERS June 2009) (Question E-1 and E-2).

Specialized Transportation as a Component in the IEP: In determining whether to include transportation in a student's IEP, and whether the student needs to receive transportation as a related service, the IEP team must consider how the student's impairments affect the student's need for transportation. Included in this consideration is whether the student's impairments prevent the student from using the same transportation provided to nondisabled students, or from getting to school in the same manner as nondisabled students. If transportation is included in the student's IEP as a related service, a school district must ensure that the transportation is provided at public expense and at no cost to the parents, and that the student's IEP describes the transportation arrangement. IDEA, 64 Fed. Reg. 12, 475, 12,479 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 33); *Yakima School District*, 36 IDELR 289 (WA SEA 2002).

FINDINGS OF FACT

1. At the start of the 2022–2023 school year, the Student was eligible for special education services under the category of other health impairment, attended a District middle school, and his June 2022 individualized education program (IEP) was in effect.
2. The Student's June 2022 IEP noted that the Student had "significant behaviors which impede his learning and that of others." The IEP referenced an attached behavioral intervention plan (BIP). The IEP included annual goals in social/emotional (following directions displaying expected behavior), with progress reporting at the quarter.² The Student's IEP included several accommodations, including accommodations related to behavior, and provided the Student with the following specially designed instruction in a *special education setting*:
 - Math: 290 minutes a week (to be provided by special education staff)
 - Reading: 145 minutes a week (to be provided by special education staff)
 - Written Expression: 145 minutes a week (to be provided by special education staff)
 - Social/Emotional: 290 minutes a week (to be provided by special education staff)

The IEP indicated the Student would spend about 51% of his time in a general education setting and spend 1,780 minutes per week in school. The Student was to receive regular transportation and had an emergency response protocol (ERP).³

² OSPI notes the IEP did not include goals in math, reading, or written expression; however, the District's response contained progress reporting in these areas, indicating there were goals. The District clarified to OSPI that upon review, the Student's June 2022 IEP did not print from the online IEP program correctly but stated that the IEP did have goals in all service areas.

³ In additional information, the District clarified that the IEP team did not develop a BIP or ERP in June 2022. The District stated an FBA and BIP were completed in fall 2022.

The prior written notice, documenting the development of the June 2022 IEP, indicated that a member of the team required the assistance of a board-certified behavior analyst (BCBA) in the “ongoing process of assessing [the Student’s] behaviors” and that the team considered but rejected a more restrictive setting such as a regional behavior program or “out of district [emotional behavioral disability] program.” The prior written notice indicated the IEP team planned to “reconvene in the fall after [Student] has had a chance to acclimate to the new environment to reassess the decisions made today.”

3. The District’s 2022–2023 school year began on September 6, 2023.
4. The Complainant alleged the District improperly denied the Student access to a full day of school, which impacted his access to specially designed instruction. The Complainant stated the District did not provide an “adequate reason for a reduced day schedule or...a plan [for] returning the [Student] to full days of school.” The Complainant alleged the District failed to provide an appropriate alternative placement for the Student and failed to provide transportation for the Student.
5. In September 2022, the Student was subject to several disciplinary actions, including:
 - September 12: The Student was emergency expelled following police responding to prank 911 calls making false reports of criminal activity that came from the Student’s cell phone.
 - September 21: The Student was short-term suspended for punching a student.
 - September 29: The Student was short-term suspended for using offensive and inappropriate language and failing to cooperate with adult requests.
6. The Student had an “individual student safety plan,” dated September 15, 2022 (and which was later updated on October 25, 2022). The safety plan included information about unsafe behaviors, a detailed supervision plan that included supervision related to bathroom visits, transitions between classes, lunch, school arrival, cell phone use, and access to school supplies. The plan listed triggers/warning signs, coping strategies, who would monitor the plan, and contact information.
7. A September 20, 2022 prior written notice indicated the Student’s team proposed conducting a functional behavioral assessment (FBA) to inform the development of a BIP due to the Student’s behaviors, suspensions, and administrative referrals.
8. In October 2022, the Student was subject to several disciplinary actions, including:
 - October 4: The Student was disciplined for inappropriate behavior during class.
 - October 7: The Student was disciplined for pushing another student.
 - October 13: The Student was emergency expelled for stealing and possession of a weapon.
 - October 31: The Student was removed from class for inappropriate behavior and defiance.
9. An October 18, 2022 prior written notice indicated that the Student had been emergency expelled and that a manifestation determination was required. The notice also indicated that an “FBA and a BIP are in the process of being conducted.”

10. On October 25, 2022, according to meeting notices, the Student's team met to discuss the need for an FBA and a manifestation determination.

The team implemented a "re-entry safety plan" for the Student's return to school. The safety plan included:

Supervision related to access to the restroom, access to his cell phone, escort from class-to-class and to get lunch, location of his lunch and logistics regarding his morning check-in...[and] additionally, Student was not allowed to have a backpack at school and his school supplies, including Chromebook, were to be left in each classroom for his use.

The safety plan included the Student's triggers or warning signs: "isolating from others, not talking/shutting down/putting head down/sleep, putting hood/hat/sunglasses on, disrespectful behavior, making a joke out of everything and getting significantly behind in schoolwork"; and included coping strategies: "music, a moment outside the classroom door to reset and napping (brief 3–5 minute head down as a reset)."

The District stated, "The Plan indicated that, while the team believed Student was safe to be back at school and teachers and students were also safe, everyone needed to be hyper-vigilant and attentive."

11. According to the District's response, the Student's guardian requested a shortened school day on or around October 25, 2022. The District stated the "shortened day did not interrupt Student's IEP minutes or services, as those services were provided in the morning while Student was at school."

12. The Student's shortened school day schedule was as follows:

- Zero Period: Advisory
- First Period: Transitions (special education setting)
- Second Period: English language arts (special education setting)
- Third Period: Science
- Fourth Period: Math (special education setting)

13. On November 2, 2022, the Student's IEP team met. The team reviewed the FBA and developed a BIP. The team noted the Student's behaviors had resulted in suspensions and impacted his academic performance and the education of his peers. The FBA noted the Student was "on a reduced day as an intervention" and included data on numerous behaviors of concern, and analysis of several target behaviors.

One prior written notice, documenting the meeting, indicated the team reviewed the FBA and draft BIP, and that the Student displayed a "significant need for a [BIP]."

A second prior written notice stated the "IEP Team has determined that [Student] will benefit from a reduced day schedule. [Student] will attend school from 1st period through 4th period, and will be picked up by guardian afterward." This action was taken to "better serve the student's academic and behavioral needs" as a full day schedule "increases the likelihood of academic and behavioral issues."

The BIP indicated the Student did not show the ability to sustain attention on academic tasks, refrain from engaging in inappropriate or distracting behavior or from ignoring the inappropriate or distracting behavior of others. Data collection recorded in the BIP indicated the Student has stated he "hates school" and would "prefer to be expelled" or that he would "rather stay home." The BIP focused on the following target behaviors: "argues and must have the last word and does not accept responsibility for behaviors that are inappropriate"; "disturbing other children: teasing, provoking, fights, interrupting others"; and "does not complete tasks attempted."

14. In the Complainant's reply to the District's response, the Complainant stated that the Student was on a shortened school day schedule as of November 2, 2022. The Complainant stated this was not "something requested by the caregivers or that the caregivers believed that they had the ability to decline the offer of partial days." The Complainant stated that the District members of the IEP team had already decided the Student's day would be shortened and that the Student's day was shortened because of the Student's behavior.

The Complainant also stated that the prior written notice from the November 2022 IEP meeting "names the caregivers as the ones responsible for the transportation." The Complainant argued that if the Student was on a shortened school day, then transportation is the responsibility of the school.

15. On November 8, 2022, the Student's guardian requested an independent educational evaluation (IEE).

The District subsequently agreed to provide an IEE in behavior through an FBA, which was documented in a November 2, 2022 prior written notice. The IEE was conducted by a private behavioral consulting group (IEE provider) and the Student was assessed on several days in January 2023.

16. On November 15, 2022, the Student was removed from class due to behaviors.

17. The District was on winter break from December 19, 2022 through January 2, 2023.

18. On January 24, 2023, an advocate on the Student's team emailed District staff, requesting updates about the IEE and development of a BIP. The advocate also requested an IEP meeting be scheduled to discuss moving the Student back to a full day of school. The Student's caregivers also emailed, stating that it was in the Student's "best interest to return to a normal schedule especially considering that he is doing better in his classes and he even stated he would like to return to a regular schedule."

19. On January 31, 2023, the Student's IEP team met and discussed the Student's reduced day schedule.

According to the meeting notes, the Student's guardian stated the Student "doing better and wanting to return to full day schedule." The District noted in its response that this would mean

adding general education classes to his schedule. The notes also indicated that school staff had continued concerns regarding the amount of supervision and support needed due to the Student's behavior.

20. On February 7, 2023, the Student's case manager emailed the completed IEE report to the Student's team. The IEE report noted the "severity of escalation behaviors occurring have warranted numerous accommodations...[including]: reduce school day, 1:1 teacher escorts around school, additional supports...designated locations for lunch...the availability of the special education room through his school day." The IEE also noted that "accommodations have been made to ensure [Student] is receiving educational time and prevent his falling behind academically as much as possible." However, the IEE documented that at least one teacher has reported that "the consequence of removal from setting has created a tendency for him to engage in behaviors to avoid work."

The IEE report hypothesized that the function of the Student's behaviors was "primarily escape from demands with a close secondary function of access to attention/tangibles" and noted overall the Student "has effectively learned to engage in numerous attention-seeking behaviors in order to escape/delay demands and when those strategies are not effective...[Student's behaviors] increase in severity, resulting in escalation behaviors." At the same time, "receiving attention from peers and adults is also reinforcing."

The report included the following recommendations:

- Introduce and utilize a "Behavior Contract" (behavior expectations, rewards, and consequences).
- Develop and maintain consistent expectations.
- Develop classroom contingencies for Student and his peers.
- Avoid placing demands/expectations on Student that cannot be followed through with.
- Honor all deals, bargains, whether they are class-wide or individual.
- Deliver highly-preferred snacks when they have been earned per the "Behavior Contract", otherwise delivering "healthy/boring snacks".
- Consider conducting an additional evaluation for Student's social skills.
- Use a visual or checklist to assist with monitoring/maintaining Student's belongings.

The report also noted that there may be an increase in escalation and precursor behaviors following the initial implementation of the recommendations, referred to as an extinction burst. The report provided additional information on positive reinforcement.

21. The District noted in its response that the IEE report did not recommend increasing the Student's school day.

In the reply to the District's response, the Complainant stated that the Student's social worker and educational advocate asked the IEE provider to provide insight on whether the Student should receive a full day, "the provider refused to answer and stated it was outside of their scope" and, "Therefore, it was not mentioned in their results that the day should be increased. However, it was not mentioned whether it should be shortened, either."

22. According to the District's response, a temporary paraeducator was provided to assist staff with data collection related to the Student's performance.

23. In February 2023, the Student was subject to several disciplinary actions, including:

- February 9: The Student was removed from class due to behaviors.
- February 13: The Student had an "electronic device violation."
- February 17: The Student received a short-term suspension for breaking his safety plan and leaving class without permission.

24. On February 23, 2023, an advocate on the Student's IEP team emailed the team and requested they schedule a meeting to go over the Student's BIP, progress, and schedule.

Subsequent emails between team members discussed scheduling and on February 24, 2023, the case manager emailed another copy of the IEE report out to the team.

25. On February 24, 2023, a Department of Children Youth and Families (DCYF) social service specialist emailed the Student's team, asking if the team could address the Student's transportation needs in addition to discussing the IEE.

Internal emails between the principal and special education director following this indicated they discussed transportation and how that could be set up.

26. On March 13, 2023, the Student's IEP team met and reviewed the IEE report, including recommendations for a behavior plan and 1:1 support. According to the meeting notes, an advocate shared OSPI guidance on shortened school days.

The meeting notes indicated the case manager stated that the Student's shortened school day schedule was not disciplinary or a punishment.

The meeting notes also indicated the Student's guardians requested an increase to the Student's amount of time at school and that the Student was reporting to them a desire to attend school; however, the notes indicated the Student was telling school staff he "doesn't want to be [at] school [he] just wants to socialize."

The District, in its response, stated that "therefore [the team] did not agree it was appropriate yet to add more general education time."

27. Following the IEP meeting, on March 13, 2023, members of the Student's team and principal emailed regarding transportation and the principal stated she had reached out to the transportation department. The director indicated that transportation would be available starting March 14, 2023.

In a subsequent email on the thread, the Complainant emailed, requesting an "IEP meeting to address the half days of school and [the Student] plan to attend school full time." The Complainant requested that transportation begin no later than March 16, 2023, and stated

that if the team was “unable to come to a positive conclusion that supports this youth’s growth in school by attending full days, I would like to...request mediation.”

The case manager responded on March 14, 2023, that he was working on scheduling a follow-up meeting to address the concerns around the Student’s schedule. The case manager noted though, that the meeting would not necessarily be an IEP meeting as “potentially adding general education courses does not require an IEP meeting” and noted the Student “attends his core classes...[and] receives a Free and Appropriate Public Education.” He further stated, “...FAPE is determined by need...[Student] has demonstrated that he needs a partial day schedule. Therefore, that is his FAPE.”

28. In response to questions from OSPI regarding the case manager’s March 14, 2023 email, the District stated its position was that:

Student has been provided special education FAPE through his shortened days at school. He has received all of his services during the morning hours while at school. The District admits that Student has not received the requisite general education courses in Washington State History or P.E. due to the shortened school day, but the District is prepared to ensure that he does receive these credits in high school to be sure that he graduates on time.

29. Also, on March 14, 2023, the principal emailed the director and case manager, noting that the “recommendation for full time should only come after we see improvements in [Student’s] behavior and academic engagement in school. Like [case manager] and I [principal] shared, we can add classes, that isn’t the issue, it’s whether [Student] will and can be successful or not.”

30. On March 16, 2023, the school psychologist emailed the case manager, the principal, director, and other District and noted they were “tracking positive behaviors for this student using a formal tracking sheet that is being carried by his 1:1.”

31. According to a later, May 5, 2023, email from the principal, transportation was discussed at the March 13 meeting and was in place for school on March 14, 2023.

32. On March 21, 2023, the Complainant emailed the Student’s team, wondering when they would be able to schedule an IEP meeting. Subsequent emails included discussions about possibly holding a mediation and how that would impact the timeline for scheduling a meeting.

33. On March 31, 2023, the Student’s IEP team was scheduled to meet; however, the Student’s guardians could not attend so the meeting was canceled.

34. On April 21, 2023, the Student received a short-term suspension.

35. On April 24, 2023, the Student’s IEP team met to discuss the Student’s progress and schedule and continued discussing increasing the Student’s time at school to include more general education time.

According to the meeting notes, the team discussed that the Student had been making progress over the past four–six weeks, including demonstrating “positive behaviors.” However, the notes indicated they needed to “keep positive learning experiences to build on,” that the 1:1 support seemed to be helping, and that the Student was still sleeping in first and second period. The notes documented that the team discussed whether sleeping was a replacement behavior to other “negative behaviors [he was] previously engaging in.”

The notes included that history would be the next class to add back to the Student’s schedule and that when the Student was asked about increasing his day, he stated he “will f it up to leave.” Team members expressed concern that, while disciplinary action had decreased, the Student continued to target others in ways that were harassment, intimidation, and bullying violations. The team ultimately came to an agreement that the Student’s reduced school day schedule could be increased once he had five consecutive days with 60% positive behaviors.

36. The Complainant stated, in the reply to the District’s response, that the April 24, 2023 IEP meeting was the first time the IEP team discussed a plan to have the Student return to a full day of school, and stated, “Though the plan was not ideal the youth was able to demonstrate the ability to maintain appropriate behavior long enough for the District to allow him to return to full days of school.”
37. On April 26, 2023, the case manager emailed out behavior tracking data for the Student, for the month of April, to the Student’s team. The case manager stated that subsequently, he would scan and send the daily tracking sheet.
38. Daily behavior tracking sheets, dated April 10–28, 2023, tracked six different behaviors and tracked these behaviors for periods one through four (the Student was not at school periods five and six). The sheets included comments about the Student sleeping in class, being cooperative or uncooperative, language use, and other behaviors.
39. On May 9, 2023, an advocate on the Student’s team emailed the team and asked whether they were planning on meeting within the next two weeks to discuss “next steps/[Student’s] progress.”

In response, a teacher responded that the Student had only been in her class “4 times, and left 1 of those days (without permission)” and that she did not have any new information to share.

The advocate replied, “I understand that there may not be updates as far as progress is concerned.” And further stated, “but we’d agreed to meet in 3 weeks if there wasn’t progress to come up with a plan for [Student] to transition to high school and discuss the best way to support that for the remainder or the year.”

Additional emails discussed scheduling a meeting.

40. In response to the complaint, the District argued that it did not fail to implement the Student's IEP and special education services while he was on a shortened school day schedule. The District stated that:

As a proactive response to these challenging behaviors, Student's school day had been reduced prior to the relevant time period under investigation at the guardian's request. However, that request only impacted Student's access to general education setting in the afternoons and did not impact Student's receipt of his IEP services, all of which occurred in the morning.

In additional information, the District stated:

Student's family brought up the prospect of him having a shortened day in the fall [2022], and the team agreed to the change. While Student has had several discipline issues, those issues were not believed to be manifestations of his disability. The team is aware of the many factors in Student's background, including but not limited to several changes in foster care placement, which have caused behavioral issues and has taken into account HIB issues, including threatening other students. Nonetheless, the team has been using the FBA/BIP data to inform the decision-making on increasing Student's time at school.

The District acknowledged that there were requests to increase the Student's time at school, but that the IEP team:

reasonably [rejected the requests] based upon concerns about Student's ability to safely and appropriately manage the increased expectations of the longer school day while still teaching him appropriate behavior management skills during the shortened school day. However, based upon Student's demonstrates growth, the IEP team did agree as of April 24, 2023, that Student's schedule will increase if he has five consecutive days with 60% positive behavior.

41. The District's response included progress reporting on the Student's goals from September–December 2022, January, February, and April 2023. The progress reporting documented the following progress:

- Reading Comprehension: text level second through fourth grade, "not met".
- Math: Nothing reported.
- Writing: Not met, except for a "nearly met" in January 2023.
- Social Emotional: Not met, except for one instance of "met" the goal in November 2022.

Comments on the progress reports generally indicated the Student refused to engage, took random guesses at questions, did not appear to take the instructional exercises seriously, or slept.

At times, the Student did make an effort and received higher scores; for example, in the April 2023 report, the Student met his goal: "8/10 – Teacher read aloud passage and comprehension questions. [Student] participated and made decent attempt...in a separate setting. Indicates possible refusal based upon peer/other adults in the room pressure to perform?" Another comment indicated the Student made "minimal progress" and continued to "refuse to produce the work he is likely capable of, and does not appear to take the assessments seriously."

42. On May 26, 2023, the Student's IEP team met. According to the District, the IEP team planned to increase the Student's schedule after the Memorial Day holiday and began planning for the Student's high school schedule.
43. On June 13, 2023, the Student's annual IEP meeting was held. The IEP indicated the Student's behaviors adversely impacted his learning and the learning of others, and that specific behavior information was detailed in the Student's BIP. The IEP included goals in social/emotional (following expected behaviors), reading (comprehension), written expression (essay writing), and math (solving various operations). The IEP included several accommodations and a grading modification. The IEP included the following special education services from June 14–16, 2023, provided by special education staff in a special education setting:
- Math: 250 minutes a week
 - Reading: 200 minutes a week
 - Writing: 50 minutes a week
 - Social Emotional: 250 minutes a week

The IEP indicated the Student would receive 1,790 minutes of instruction per week, with 750 minutes in the special education setting and spend 58% of his time in the general education setting. The IEP noted:

[Student] receives specialized instruction in three of his six classes. He participates with non-disabled peers when receiving instruction in PE, Science and U.S. History. [Student] does not participate with non-disabled peers when receiving specialized instruction in ELA, Math and Transitions. [Student] has received 1:1 Paraeducator services on a trial basis this school year. During his 9th grade year, [Student] will receive 1:1 Paraeducator services daily as part of his IEP.

The IEP also included the following special education services from June 17, 2023–June 13, 2024, provided by special education staff:

- Math: 49 minutes, 3 times per week (special education setting)
- Reading: 49 minutes, 3 times per week (general education setting)
- Written Expression: 90 minutes weekly (general education setting)
- Social Emotional: 90 minutes weekly (special education setting)
- Math: 90 minutes weekly (special education setting)
- Social Emotional: 45 minutes, 3 times per week (special education setting)

The IEP also included paraeducator support for 333 minutes per day in the general education setting as a supplementary aid and service.

The IEP indicated the Student would receive 1,790 minutes of instruction per week, with 464 minutes in the special education setting and spend 74% of his time in the general education setting. The IEP noted:

[Student] will not participate with non-disabled peers when receiving specialized instruction in the area of Math in a Resource Room Math class and a Resource Room Learning Lab class. [Student] will participate with non-disabled peers when receiving specialized instruction in the areas of Reading, Written Language and Social/Emotional in co-taught courses, as well as in all other academic areas in general education classes.

The IEP indicated the Student received "regular" transportation.

44. According to notes from the June 13, 2023 IEP meeting, the Student's "major" behaviors had been reducing the last couple of weeks, although transitions and maintaining positive peer interactions continued to be challenging. The notes stated, "Major behavior are much better but minor behaviors or engagement behaviors are not changing." The notes indicated the 1:1 paraeducator was helping but the Student was not completing schoolwork and was sleeping during class.

The notes also indicated the Student was suspended shortly after starting a full day of classes, and included the following:

- "1st day on full day schedule went to all classes (sat and didn't engage in WA history and PE passed the ball with 1:1 but wasn't class work)."
- "2nd day of full day - field trip to the library and made disparaging comments and could be construed as threatening to LGBTQA group (June 1st) and was suspended 2 days out of school."
- "In school suspension: Insigniting [sic] - baiting another student into a fight (telling the student where to meet him and intimidating the student)."

One member of the team stated, according to the notes, that "I don't know what to say about the full day schedule. and it does not seem to make a difference [between] a partial or full day" and that for high school, they "Hope to start him on a full-day schedule – how he handles that is an open question, I know he is capable of doing well but he is in the habit of pretty aggressive self-sabotage."

45. On June 13, 2023, the Student's team also updated his BIP. The BIP documented the Student's behavior challenges, that the Student had been suspended (in-school and out-of-school) for 20 days during the 2022–2023 school year, and that beginning in April 2023, the Student had the support of a 1:1 paraeducator. The paraeducator also helped track the Student's behavior, including ability to follow classroom and school behavior expectations and ability to complete work and academic skills.

The BIP target the behaviors of arguing and having the last word, failure to accept responsibility for inappropriate behaviors, disturbing other students (teasing, provoking, fights, interrupting others), and failure to complete tasks attempted.

CONCLUSIONS

Issue One: Shortened School Day – The Complainant alleged the District improperly denied the Student access to a full day of school, which impacted his access to specially designed instruction. The Complainant stated the District did not provide an "adequate reason for a reduced day schedule or providing a plan of returning the [Student] to full days of school."

Students who receive special education should be allowed to participate in a district's educational programs and services to the same extent as their non-disabled peers, consistent with their rights under IDEA.

Shortened School Day: Any decision to limit or restrict a student's access and participation must be made by their IEP team, based solely on any adjustments necessary due to their disability

and/or unique needs. Districts may not condition a student's return to a full school day on a district's staffing needs. Instead, districts must make decisions based on a student's right to be in their least restrictive environment. If a student receiving special education services cannot attend school a full school day, the reason must be documented in his or her records and addressed in the student's IEP. Districts should not use a shortened school day as a form of punishment or as a substitute for positive behavior strategies and supports or a BIP. Instead, an IEP team should consider developing an IEP that includes a BIP that describes the use of positive behavioral interventions, supports, and strategies reasonably calculated to address the student's behavioral needs and enable the student to participate in the full school day.

Here, on November 2, 2022, the Student's IEP team determined the Student would begin a shortened school day and attend first through fourth period (and not fifth or sixth period). The District stated the Student's guardian requested the shortened day. The Complainant stated that she did not believe the shortened day was either "something requested by the caregivers" or "that the caregivers believed that they had the ability to decline the offer of partial days."

Regardless of whether the guardian requested a shortened school day, here, it is not clear that the reason for the shortened school day was due to the Student's disability. Again, any decision to limit or restrict a student's access and participation must be made by their IEP team, based solely on any adjustments necessary due to their disability and/or unique needs. The Student was eligible under the other health impairment category, and while the Student's IEP clearly indicated the Student had significant behaviors that impeded his learning, it is not clear the shortened school day schedule, specifically, was a disability related need.

The District stated the shortened day was FAPE for the Student, was not disciplinary, and was taken to "better serve the student's academic and behavioral needs," as a full day schedule "increases the likelihood of academic and behavioral issues." And while prior to the shortened school day schedule, in September and October 2022, the Student was subject to several disciplinary actions, the District stated, "those issues were not believed to be manifestations of his disability." This points to a shortened school day being a disciplinary response to the Student's behaviors and *not* a disability related need—if the behaviors that lead to discipline were not manifestations of the Student's disability, then it is unclear what disability related need the Student had for a shortened day. Other documentation also indicates that the shortened day was more likely due to concerns about the resources the Student required as the IEP team notes indicated that school staff had continued concerns regarding the amount of supervision and support needed due to the Student's behavior. And as the shortened day schedule went on, it seemed increasingly disciplinary in nature, especially given the Student ultimately had to earn his way back to more time at school—that the Student's reduced school day schedule could be increased once he had five consecutive days with 60% positive behaviors—and staff stated, "recommendation for full time should only come after we see improvements in [Student's] behavior and academic engagement in school." A student's access to their least restrictive environment (LRE) and instruction generally shall be based on the student's unique needs; it is contrary to the IDEA to require a student to earn time in school.

Further, while documentation indicates the IEP team “determined that [Student] will benefit from a reduced day schedule,” the Student’s schedule was shortened before sufficiently attempting other behavioral interventions. The Student’s June 2022 IEP referenced a BIP; however, the District stated that an FBA and BIP were not conducted and developed until fall 2022, coinciding with the shortened day schedule. While the FBA itself documented the Student was “on a reduced day as an intervention,” this intervention seems to have been the first major intervention attempted. (OSPI notes a safety plan was developed that included increased supervision; however, it appears this was put in place in late October 2022, shortly before the FBA was completed and shortened day schedule out in place. So, the safety plan was implemented for a relatively short period of time.) Finally, the June 2022 IEP indicated that the team required the assistance of a board-certified behavior analyst (BCBA) in the “ongoing process of assessing [the Student’s] behaviors,” yet it is not clear BCBA support was ever provided.

Finally, the District stated that the team has been using the FBA/BIP data to inform the decision-making on increasing the Student’s time at school. This is, in part, true. The Student continued to exhibit challenging behaviors and receive disciplinary consequences, and the Student’s team gathered data on the Student’s behaviors. The team also considered an IEE completed in winter/spring 2023, which documented the severity of the Student’s behaviors, hypothesized that the function of the Student’s behaviors was “primarily escape from demands with a close secondary function of access to attention/tangibles” and noted overall the Student “has effectively learned to engage in numerous attention-seeking behaviors in order to escape/delay demands and when those strategies are not effective...[Student’s behaviors] increase in severity, resulting in escalation behaviors.”

Yet, neither the District FBA or the BIP, nor the IEE, clearly indicate a *disability related reason* for the shortened day. The District stated the IEE did not recommend increasing the Student’s school day. However, the Complainant correctly pointed out that the IEE neither recommended a shortened day nor recommended increasing the Student’s day.⁴ And importantly, the IEE documented that at least one teacher reported that “the consequence of removal from setting has created a tendency for him to engage in behaviors to avoid work.”

Overall, OSPI finds that the decision to place the Student on a shortened day schedule and maintain a shortened day schedule are in violation of the IDEA. While the decision was clearly related to the Student’s behavior, there does not appear to be an actual *disability related need* for a shortened school day. Rather, the documentation indicates the decision was based on the resources needed to support the Student and was disciplinary in nature, given the Student was required to earn a full day of school. OSPI finds a violation.

⁴ The Complainant also stated that the Student’s social worker and educational advocate asked the IEE provider to provide insight on whether the Student should receive a full day, “the provider refused to answer and stated it was outside of their scope,” and, “Therefore, it was not mentioned in their results that the day should be increased. However, it was not mentioned whether it should be shortened, either.”

The District will be required to convene the Student's IEP team to discuss the plan to ensure the Student has access to a full school day during the 2023–2024 school year and the District will conduct an audit to identify how many students in the District have shortened school days.

Return to a Full School Day: Several IEP meetings were held to discuss the Student, the Student's behaviors, and educational plan. Beginning in late January 2023, non-District members of the Student's team began requesting that the Student return to a full day schedule. The Student's guardians stated that the Student was doing better in classes and "he even stated he would like to return to a regular schedule." The Complainant stated it was not until April 24, 2023, that the team discussed a plan to return the Student to a full day. OSPI notes that while in isolation, the lack of plan to return the Student to a full day schedule is not a violation, it is contrary to OSPI guidance. It is best practice to accompany any plan to shorten a student's day with a plan to return them to school full time from the beginning.

As of April 24, 2023, the team discussed that the Student had been making progress over the past four–six weeks, including demonstrating "positive behaviors." However, the notes indicated they needed to "keep positive learning experiences to build on," that the 1:1 support seemed to be helping, and that the Student was still sleeping in first and second period. The notes documented that the team discussed whether sleeping was a replacement behavior to other "negative behaviors [he was] previously engaging in." Behavior tracking sheets and other documentation indicated the Student continued to have challenging behaviors. The documentation also showed the Student understood he would get to leave school and go home for certain behaviors.

Ultimately, according to the District, the Student's IEP team planned to increase the Student's schedule after the Memorial Day holiday and the Student returned to a full day schedule in June 2023. On June 13, 2023, the Student's IEP team met and developed the Student's annual IEP, which returned the Student to a full school day and formalized the addition of 1:1 paraeducator support. Meeting notes indicated the Student's "major" behaviors had been reducing, although there were still challenges with transitions, positive peer interactions, and other minor behaviors. The notes indicated the 1:1 paraeducator was helping but the Student was not completing schoolwork and was sleeping during class. The notes further indicated the Student was suspended again shortly after starting a full day of classes. The team also updated the Student's BIP.

While the District took appropriate steps to add supports and at the end of the school year to return the Student to a full day of school, as indicated above, the IEP team will meet and further plan for the 2023–2024 school year to ensure the necessary behavior supports and systems are in place to support the Student's access to a full day of school.

Access to Specially Designed Instruction: A district must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a student with a disability and those required by the IEP.

The District stated that the "shortened day did not interrupt Student's IEP minutes or services, as those services were provided in the morning while Student was at school." The Student's schedule supported this as his shortened day schedule included the following classes in a special education setting: transitions, English language arts, and math; and a general education science class. The documentation in the complaint indicates that when the Student was in school, his IEP was implemented and specially designed instruction provided. The District argued that because the Student's IEP was implemented and special education services provided, the Student was provided a FAPE.

While the Student was able to access specially designed instruction in his shortened school day, he was not necessarily in his least restrictive environment (LRE). The Student's June 2022 IEP indicated the Student would spend about 51% of his time in the general education setting; however, in the shortened day schedule, three of his four classes were in a special education setting and thus, he only spent about 25% of his time in a general education setting. While District staff stated the Student "demonstrated that he needs a partial day schedule [and] therefore, that is his FAPE," the Student's IEP was not amended to reflect the shortened day schedule; so, the IEP was not being implemented in the Student's LRE, meaning that the shortened day schedule was not necessarily FAPE.

Thus, while specially designed instruction was provided, OSPI finds a violation as the June 2022 IEP was not implemented in the Student's LRE. The District noted that due to this, the "Student has not received the requisite general education courses in Washington State History or P.E. due to the shortened school day." Thus, as corrective action, the IEP team will discuss a plan to ensure that he does receive these credits in high school to be sure that he graduates on time.

Issue Two: Behavior & Transportation Needs – The Complainant alleged the District failed to provide an appropriate alternative placement for the Student and failed to provide a plan to return the Student to a full day of school. The Complainant also alleged the District failed to provide transportation for the Student.

Behavior: In developing, reviewing, and revising each student's IEP, the team must consider the use of positive behavioral interventions and supports and other strategies to address the student's behavior. This means that in most cases in which a student's behavior impedes his or her learning or that of others, and can be readily anticipated to be repetitive, proper development of the student's IEP will include positive behavioral interventions, strategies, and supports to address that behavior. An FBA and BIP must be used proactively, if an IEP team determines that they would be appropriate for a child.

Aside from the issue of the shortened school day, the Student's IEP team did take several steps to address his behavior needs. Following several disciplinary incidents in September and October 2022, including instances of suspension and emergency expulsion, the team determined an FBA and BIP were needed. The District developed an "individual student safety plan" that included information about unsafe behaviors, a detailed supervision plan that included supervision related to bathroom visits, transitions between classes, lunch, school arrival, cell phone use, and access to

school supplies. The plan listed triggers/warning signs, coping strategies, who would monitor the plan, and contact information.

On November 2, 2022, the Student's IEP team met and reviewed the FBA and developed a BIP. Following a request for an IEE, which the District granted in November 2022, an IEE through an FBA was conducted and then reviewed by the Student's team.

At some point between February and April 2023, the Student began receiving 1:1 paraeducator support, part of which was the paraeducator collecting data on the Student's behavior. In June 2023, the Student's IEP team developed his annual IEP, which included specially education services in social/emotional/behavioral, accommodations, and updated the Student's BIP.

Thus, aside from the shortened school day schedule, the Student's IEP team took the appropriate steps to consider and address the Student's behaviors, including conducting an FBA, developing a BIP and a safety plan, considering an IEE, and adding paraeducator support. The Student has had continued behavioral challenges, and the IEP team has continued to meet and discuss concerns and supports. Aside from the shortened day issue discussed above, OSPI finds no violation.

Transportation: In determining whether to include transportation in a student's IEP, and whether the student needs to receive transportation as a related service, the IEP team must consider how the student's impairments affect the student's need for transportation. Included in this consideration is whether the student's impairments prevent the student from using the same transportation provided to nondisabled students, or from getting to school in the same manner as nondisabled students. If transportation is included in the student's IEP as a related service, a school district must ensure that the transportation is provided at public expense and at no cost to the parents, and that the student's IEP describes the transportation arrangement.

Here, the Student's June 2022 and later June 2023 IEPs included regular transportation. The documentation indicates that transportation was first raised and requested on February 24, 2023. Although the Complainant alleged that because the District placed the Student on a shortened school day schedule, the District should have provided transportation. The DCYF social services specialist asked if the team could address the Student's transportation needs, although it is not clear they were requesting special education transportation services. Regardless, emails and documentation indicate the District discussed how transportation could be set up, contacted the transportation department, and transportation was in place by March 14, 2023—approximately 2.5 weeks later.

Overall, the documentation does not indicate the Student had a disability related need for special education transportation services, rather that the Student may not have been able to access regular District transportation given his shortened day schedule. Once a specific request related to transportation was made, the District was responsive to the request and began providing transportation shortly thereafter. OSPI finds no violation related to the Student's transportation needs.

CORRECTIVE ACTIONS

By or before **August 4, 2023** and **September 15, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

IEP Meeting

By or before **September 8, 2023**, the Student's IEP team will meet. At the meeting, the IEP team must address the following topics:

- Discuss the plan to ensure the Student has access to a full school day during the 2023–2024 school year.
- Discuss the necessary behavior supports and systems needed to support the Student's access to a full day of school and the plan to ensure these systems and supports are in place. The IEP team could consider whether counseling as a related service, additional social emotional/behavior specially designed instruction is needed, or other supplementary aids and services.
- Per the Student's 2022 IEP, OSPI recommends the IEP team revisit whether additional support from a BCBA is needed.
- Discuss the plan to ensure the Student receives history and PE credits in high school to be sure that he graduates on time.

By **September 15, 2023**, the District will provide OSPI with: i) a prior written notice, summarizing the group's discussion and decisions concerning the above matters; ii) a copy of the Student's IEP; iii) any relevant meeting invitations and prior written notices; and iv) any other relevant documentation.

DISTRICT SPECIFIC:

Audit

The District will conduct an audit of its students eligible for special education to identify students that are on a shortened school day. The District will review the student files and provide a list or spreadsheet of all students eligible for special education currently on a shortened day, at any point during the 2022–2023 school year, including initiation date and (as applicable) end date. The District may wish to partner with the ESD or a consultant to carry out this audit.

By **August 4, 2023**, the District will provide OSPI with a list or spreadsheet of all students eligible for special education currently on a shortened day, at any point during the 2022–2023 school year, including initiation date and (as applicable) end date. The spreadsheet will include the following:

- Student name, grade, and disability category
- Each student's placement
- Whether the student's school day has been shortened and why that decision was made.
- Initiation date of a shortened day schedule and (as applicable) end date.

Following receipt of the spreadsheet, OSPI will review and determine if further documentation deadlines or corrective actions are needed related to the findings of the audit. If concerns arise during the audit, OSPI encourages the District to propose next steps.

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 22nd day of June, 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.)