

## **SPECIAL EDUCATION CITIZEN COMPLAINT (SECC) NO. 18-51**

### **PROCEDURAL HISTORY**

On May 23, 2018, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Citizen Complaint from the parent (Parent) of a student (Student) attending the Yakima 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 May 24, 2018, 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 June 15, 2018, OSPI received the District's response to the complaint and forwarded it to the Parent on the same day. OSPI invited the Parent to reply with any information she had that was inconsistent with the District's information.

On June 27, 2018, OSPI granted the Parent an extension of time until July 5, 2018, to submit her reply to this complaint.

On July 2, 2018, OSPI received the Parent's reply. OSPI forwarded that reply to the District on the same day.

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

### **OVERVIEW**

During the 2017-2018 school year, the Student attended a District high school and was eligible to receive special education services. Due to his health needs, his individualized education program (IEP) provided for 1:1 nursing care throughout his school day and when riding the school bus to and from school. The District contracted with a nursing agency (agency 1) to provide the services. Also during the 2017-2018 school year, the Student received private nursing services in his home from nurses employed by another nursing agency (agency 2). In May 2018, a contracted nurse was employed by both agency 1 and agency 2, and provided the Student nursing care at school and in his home. On May 14, the Parent contacted the school to express that she no longer wanted the contracted nurse to provide the Student care at school, due to an incident involving the contracted nurse violating the family's privacy. On May 15, District staff met with the Parent to discuss her concern. It was also discussed that another nurse was not available to provide the nursing services, and that the contacted nurse would continue to provide the school care on her regularly scheduled days for the remainder of the school year. On May 17, the contracted nurse arrived at the family's home to ride the bus to school with the Student, but the Parent would not allow the Student to ride with the nurse. The Parent then brought the Student to school, again expressed her concern regarding the contracted nurse, and was reportedly asked to take the Student home.

The Parent alleged that the District failed to implement the Student's IEP on May 17, 2018. The District denied the allegations.

### ISSUE

1. Did the District implement the Student's individualized education program (IEP) on May 17, 2018?

### LEGAL STANDARDS

IEP Definition: An IEP must contain a statement of: (a) the student's present levels of academic achievement and functional performance; (b) measurable annual academic and functional goals designed to meet the student's needs resulting from their disability; (c) how the district will measure and report the student's progress toward their annual IEP goals; (d) the special education services, related services, and supplementary aids to be provided to the student; (e) the extent to which the student will not participate with nondisabled students in the general education classroom and extracurricular or nonacademic activities; (f) any individual modifications necessary to measure the student's academic achievement and functional performance on state or district-wide assessments and if the IEP team determines that the student must take an alternate assessment instead of a particular regular state or district-wide assessment of student achievement, a statement of why: the student cannot participate in the regular assessment and the particular alternate assessment selected is appropriate for the student; (g) Extended School Year (ESY) services, if necessary for the student to receive a free and appropriate public education (FAPE); (h) behavioral intervention plan, if necessary for the student to receive FAPE; (i) emergency response protocols, if necessary for the student to receive FAPE and the parent provides consent as defined in WAC 392-172A-01040; (j) the projected date when the services and program modifications will begin, and the anticipated frequency, location, and duration of those services and modifications; (k) beginning no later than the first IEP to be in effect when the student turns 16, appropriate, measurable postsecondary goals related to training, education, employment, and independent living skills; and transition services including courses of study needed to assist the student in reaching those goals; (l) beginning no later than one year before the student reaches the age of majority (18), a statement that the student has been informed of the rights which will transfer to him or her on reaching the age of majority; and (m) the district's procedures for notifying a parent regarding the use of isolation, restraint, or a restraint device as required by RCW 28A.155.210. 34 CFR §300.320; WAC 392-172A-03090.

Related Services: Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in students, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 CFR §300.34(a); WAC 392-172A-01155(1).

School Health and Nurse Services: School health services and school nurse services means health services that are designed to enable a student eligible for special education to receive FAPE as described in the student's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. 34 CFR §300.34; WAC 392-172A-01155(3)(m).

Medication or Treatment Orders: The attendance of every child at every public school in the state shall be conditioned upon the presentation before or on each child's first day of attendance at a particular school of a medication or treatment order addressing any life-threatening health condition that the child has that may require medical services to be performed at the school. Once such an order has been presented, the child shall be allowed to attend school. A "life-threatening condition" means a health condition that will put the child in danger of death during the school day if a medication or treatment order and a nursing plan are not in place. "Medication or treatment order" means the authority a registered nurse obtains under RCW 18.79.260(2). RCW 28A.210.320.

Registered Nurse—Activities Allowed—Delegation of Tasks: A registered nurse under his or her license may perform for compensation nursing care, as that term is usually understood, to individuals with illnesses, injuries, or disabilities. A registered nurse may, at or under the general direction of a licensed physician...administer medications, treatments, tests, and inoculations, whether or not the severing or penetrating of tissues is involved and whether or not a degree of independent judgment and skill is required. Such direction must be for acts which are within the scope of registered nursing practice. A registered nurse may delegate tasks of nursing care to other individuals where the registered nurse determines that it is in the best interest of the patient. The delegating nurse shall: (i) Determine the competency of the individual to perform the tasks; (ii) Evaluate the appropriateness of the delegation; (iii) Supervise the actions of the person performing the delegated task; and (iv) Delegate only those tasks that are within the registered nurse's scope of practice. Except in limited circumstance, a registered nurse may not delegate the administration of medications or acts requiring substantial skill, and may not delegate piercing or severing of tissues. Acts that require nursing judgment shall not be delegated. RCW 18.79.260.

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 who is eligible to receive special education services. 34 CFR § 300.323; WAC 392-172A-03105. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 34 CFR §§300.320 through 300.328; WAC 392-172A-03090 through 392-172A-03115. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. The initial IEP must be implemented as soon as possible after it is developed. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105.

School Personnel: As a general rule, districts have discretion in personnel decisions, such as staffing assignments or hiring. *Gellerman v. Calaveras Unified Sch. Dist.*, 37 IDELR 125 (9<sup>th</sup> Cir. 2002). There is no authority in the IDEA, regulations or case law, to afford a parent the right to make personnel choices for a district. *In the Matter of the Clover Park School District*, OSPI Cause No. 2004-SE-0072X (WA SEA 2004).

### FINDINGS OF FACT

1. During the 2017-2018 school year, the Student attended a District high school and was eligible to receive special education and related service under the category of intellectual disability.
2. The District's 2017-2018 school year began on August 30, 2017.
3. The Student's individualized education program (IEP) in place at the beginning of the school year was developed in June 2017. The June 2017 IEP noted that the Student's health concerns required a 1:1 nurse to be with him at all times to monitor him. The IEP included annual goals in the areas of reading, writing, math, adaptive, and post-secondary transition. The IEP provided for the following specially designed instruction in a special education setting:
  - Reading – 375 minutes per week
  - Writing – 375 minutes per week
  - Math – 375 minutes per week
  - Adaptive – 375 minutes per week

The June 2017 IEP also provided for the following related services:

- Transportation (bus) – daily
  - 1:1 Nursing (school and bus) – 1,750 minutes per week
4. During the 2017-2018 school year, the Student also had an individualized health plan in place and an individualized emergency care plan. The health plan stated that the Student was:  
Ventilator dependent during sleep; Trach capped during day unless ill; Capable of self-feeding; Cardiac (non-dependent) pace maker placed for sinus node dysfunction & bradycardia...Private 1:1 RN<sup>1</sup> accompanies student on bus and during school hours. Seizure disorder diagnosed...Seizures looks like passes out, shakes, and eyes roll back.

The health plan also stated that for the Student's daily routine:

Snacks provided by classroom teacher and private nurse. Private RN present for all recesses; trach to remain capped while outside. Treatment: diaphragm pacers or ventilator at all times.

The emergency care plan stated:

- Need for Direct Nursing Care at All Times – RN/LPN<sup>2</sup> to maintain patient airway, trach suction, and monitor and report any significant changes to family and physician. All medications administered per doctors order.

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<sup>1</sup> RN stands for registered nurse.

<sup>2</sup> LPN stands for licensed practical nurse.

- Trach and Ventilator Care – Emergency trach with Student and available at all times. If trach tube blocked by secretions, wheezing, or altered respiratory status is observed Student will receive trach suctioning and albuterol treatments as ordered by provider.
  - Seizure Disorder – Clinical seizure identified as right hand twitch, head rocking, and eye rolling. Nurse will administer seizure medications per doctor’s orders, and the 1:1 nurse will assess and determine when/if 911 needs to be called.
5. Also for the 2017-2018 school year, the Student’s physician completed the District’s “Physician’s Orders for Special Nursing Care/Medical Treatment Procedures” form.<sup>3</sup> The form stated:

In order for this student to attend school, it is absolutely necessary that the following services be performed during school hours. If specific training or instruction is necessary, I am willing to participate in this.

The form also stated in relevant part:

- Time procedures/service to be performed: *Medication as needed, replace trach tube if dislodged, trach suctioning as needed.*<sup>4</sup>
  - Training needed for non-medical person to perform this service: *1:1 RN/LPN to maintain airway, trach suction, administer medication as ordered by MD. \*If staff cannot be provided by home-care company, then ok for mom to provide care, as she is certified and trained.*
6. Based on the documentation in this complaint, the District contracts with a private nursing agency (nursing agency 1) to provide the Student’s 1:1 nursing care while he is at school. Another private nursing agency (nursing agency 2) also provides the Student nursing care in his home. Also based on the documentation in this complaint, nursing agency 1 and nursing agency 2 employ some of the same nurses, and in the Student’s case, sometimes the same nurse provides the Student services at school and in his home.
7. According to the Parent’s complaint, on Saturday, May 12, 2018, the contracted nurse providing the Student’s home care brought an unknown person to the family’s home. The Parent believed this was a violation of medical privacy laws, and that this also violated the family’s personal privacy.
8. Also according to the Parent’s complaint, on Monday, May 14, 2018, the Parent contacted nursing agency 2 to inform them about the contracted nurse bringing someone to the family’s home. The Parent asked that the contracted nurse be removed from providing the Student care, and the contracted nurse was terminated from the Student’s case. The Parent also contacted the “nurse scheduler” for nursing agency 1 to inform her of what had occurred and expressed that she no longer wanted the contracted nurse to provide the Student’s 1:1 care at school. In response, the nurse scheduler reportedly stated that she could not discuss the contracted nurse with the Parent, because the contracted nurse was not providing school related care (under the employ of nursing agency 1) on May 12. The nurse scheduler also

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<sup>3</sup> Signed and dated by the Student’s physician on August 24, 2017.

<sup>4</sup> Language in italics, handwritten by the Student’s physician.

stated that there was a nurse shortage and no other nurses were available to provide the Student's 1:1 care at school.

9. Based on the documentation in this complaint, also on May 14, 2018, the Parent called the school nurse at the Student's high school, expressing concerns about the care the contracted nurse was providing. The Parent asked if the Student's aunt could provide the Student care at the high school, and what the process was to make this happen, including whether any paperwork needed to be completed.
10. Also on May 14, 2018, in response to the Parent's call, the school nurse exchanged emails with the District executive director of special education (executive director). The emails are summarized below.
  - The school nurse emailed the executive director, informing her of the Parent's concerns/questions and asked how she should respond to the Parent.
  - The executive director replied that the District could not assume liability for a family member providing at-school care for a student. The executive director asked if the Parent had spoken to anyone else at the school regarding her concerns with the care the contracted nurse was providing, and stated that the school nurse could give the Parent the director's contact information.
  - The school nurse responded that the Parent had only spoken with her about the concerns, and stated that she had given the Parent the phone number for the District's health coordinator. The school nurse also stated that the Parent had spoken with nursing agency 2, in addition to nursing agency 1, and the Parent had been informed there was not another nurse available to work with the Student. The school nurse stated that she would call the Parent and give her the executive director's number.
11. Later on May 14, 2018, the Parent contacted the executive director to express her concerns about the contracted nurse and asked that another nurse be assigned to the Student.
12. According to the Parent's reply to the District's response to this complaint, on May 15, 2018, nursing agency 1 contacted the Parent and informed her that no nurses were available to provide services to the Student that day. As a result, the Student did not attend school that day. The Student's attendance record shows that he was absent on May 15, 2018.
13. Also on May 15, 2018, a meeting was held to discuss the Parent's concerns. The following people attended the meeting:
  - Parent
  - Student's aunt
  - Executive director
  - Assistant principal
  - Special education teacher

According to the District's response to this complaint, at the meeting, it was discussed that nursing agency 1 did not have any other nurses available at that time to provide the Student's 1:1 nursing services at school. The Parent then reportedly agreed that the contracted nurse

would “finish out the school year working the days she was scheduled”.<sup>5</sup> The group also discussed that if the Parent wanted to come to the high school, she needed to check in with the office staff and follow visitor protocols. According to the Parent’s reply to the District’s response, at the meeting, she was informed that if she wanted the Student to attend school, the contracted nurse would continue to provide the Student services on the nurse’s scheduled days. The District also informed the Parent that she was welcome to come to the high school and “be with” the Student. It was the Parent’s understanding that if a nurse was not available to attend school with the Student, then she would be his back-up caregiver as stated in his health plan and physician’s order. Neither the Student’s health plan nor emergency care plan address the Parent providing medical care to the Student.

14. Based on the information in this complaint, on the morning of May 16, 2018, the contracted nurse met the Student at his home to ride with the bus with the Student to the high school, and provide the Student nursing care during his school day. The Student’s father then informed the Parent that the contracted nurse was providing the Student’s care that day, and due to the Parent’s concern about the contracted nurse, the Parent asked the Student’s aunt to pick up the Student early from school (around 2:00 p.m.). The aunt then transported the Student and the contracted nurse to the family’s house, so the nurse could pick up her car. Also that day, the Parent contacted the executive director to inform her that she did not feel comfortable sending the Student to school with the contracted nurse.
15. Also on May 16, 2018, the Student’s physician wrote a letter, stating that the Student’s aunt could also take care of the Student at school if a nurse or the Parent was not able to do so.
16. Based on the information provided in this complaint, the following occurred on the morning of May 17, 2018:
  - The contracted nurse arrived at the family’s home to ride the bus with the Student to the high school. The Parent then asked the contracted nurse to leave, stating that she would drive the Student to school herself and that the contracted nurse was not welcome in the family’s home or near the Student.
  - The contracted nurse then contacted nursing agency 1 and went to the high school.
  - At 7:26 a.m., nursing agency 1 contacted the executive director about the events earlier that morning.
  - Shortly thereafter, the Parent drove the Student to school and stayed with the Student while he ate breakfast and went to his first period class, which began at 8:00 a.m.
  - At 8:10 a.m., the District executive director called the Student’s special education teacher and was informed that the Student and the Parent were in the special education classroom, and that the Parent had relayed to other students that she was the Student’s nurse.

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<sup>5</sup> According to the District’s response to this complaint, the contracted nurse was scheduled to provide six-nine days of services during the remainder of the 2017-2018 school year. According to the Parent’s reply to the District’s response to this complaint, the contracted nurse was scheduled to provide ten days of services during the remainder of the 2017-2018 school year. Based on the District’s 2017-2018 school calendar from May 16-June 14, when the school year ended, there were twenty-one days of school.

- At 8:12 a.m., the executive director called the high school assistant principal and informed him of the situation and that the contracted nurse was on the school's campus.
- At 8:15 a.m., the contracted nurse spoke with the school nurse, informing her that the Parent had dismissed the contracted nurse.
- At 8:35 a.m., the assistant principal approached the Parent and asked if she was a nurse, and the Parent stated that she was not. The assistant principal then reportedly asked that the Parent take the Student home for the day, until the staff could figure out what was going on.
- The Parent then took the Student home. The Parent stated in her complaint that she was not given the option of staying with the Student at school to provide his nursing care. The Parent stated in her reply to the District's response to this complaint that the Student felt humiliated by having to leave and was confused as to the reason.
- At 8:42 a.m., the assistant principal called the executive director and stated that the Parent refused to allow the contracted nurse to work with the Student and had reportedly chosen to take the Student home.

17. The Student's attendance records shows that the Student was absent from his 2<sup>nd</sup>-6<sup>th</sup> period classes on May 17, 2018.

18. Based on the information in this complaint, on May 18, 2018, the District held a meeting with the Parent to discuss the Student's nursing care. According to the District's response to this complaint, the following people attended the meeting:

- Parent
- Student's father
- Student's aunt
- Student's physician (via phone)
- Assistant director of special education
- Assistant principal
- Special education teacher
- Three representatives from nursing agency 1 and nursing agency 2

At the meeting, the group discussed that due to safety and liability concerns, the Student could not attend school without a nurse present. The group also discussed that the Parent knew how to care for the Student, but was not a certified nurse, and that while the Parent or the Student's aunt were welcome to accompany the Student to school, a nurse was required to be on the high school campus with the Student. The group also discussed that nursing agency 1 would provide the Student's nursing care until the end of the 2017-2018 school year.

## **CONCLUSIONS**

The Parent alleged that the District failed to implement the Student's IEP on May 17, 2018, when it asked her to take the Student home from school, instead of allowing her to provide the Student's nursing care at school.



An IEP must contain a statement of the special education services, related services, and supplementary aids to be provided to the student. Related services include school health services and school nurse services. School nurse services are services provided by a qualified school nurse. 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.

The Student's June 2017 IEP, which was in place on May 17, 2018, provided for 1:1 nursing care as a related service to enable the Student to attend school and ride the school bus to and from school. On May 17, 2018, the District had a contracted nurse ready to provide the Student 1:1 nursing care on the school bus and while he was at school, but the Parent elected to not allow the contracted nurse to provide services to the Student, due to concerns with the contracted nurse's work outside of a school related setting. School districts have discretion in personnel decisions, such as staffing assignments or hiring, and there is no authority in the IDEA, state regulations, or case law, to afford a parent the right to make personnel choices for a district. Therefore, the District was not required to provide another nurse for the Student on May 17, 2018. Additionally, while the Parent has also expressed concern that the District did not allow her the option of providing the Student's nursing care services on May 17, there is no requirement that a school district must allow a parent to provide nursing care for a student. Again, the District has discretion in making staffing assignments. The documentation in this complaint does not substantiate whether the District asked the Parent to take the Student home on May 17 in order to sort out the issue with the contracted nurse, as the Parent and the District have provided conflicting information regarding the events which occurred at the school on May 17. However, it is also noted that if the Student is not able to attend school due to a lack of available nursing staff, such as on May 15, 2018, the District needs to have a plan in place to address any services the Student may not receive. The District has substantiated that it followed procedures for implementing the Student's IEP on May 17, 2018.

### **CORRECTIVE ACTIONS**

**STUDENT SPECIFIC:**

None.

**DISTRICT SPECIFIC:**

None.

Dated this \_\_\_\_ day of July, 2018

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.)