

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-30

PROCEDURAL HISTORY

On March 11, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Bethel School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On March 11, 2022, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On March 24, 2022, OSPI placed Issue 3 in abeyance as OSPI received notification that the District had filed a due process hearing request in response to the Parent's request for an independent educational evaluation (IEE).

On March 28, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on March 29, 2022. OSPI invited the Parent to reply.

On April 13, 2022, OSPI interviewed the Parent as the Parent's reply to the District's response.

On April 18, 2022, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on the same day.

On April 29, 2022, OSPI interviewed the Student's former 1:1 nurse.

OSPI considered all information provided by the Parent and the District as part of its investigation. It also considered the information received during the interviews.

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on March 12, 2021. These references are included to add context to the issues under investigation and are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUES

1. Did the District follow procedures to implement the Student's individualized education program during the 2021–2022 school year, including providing 1:1 nurse services?
2. Did the District follow procedures to re-develop or amend the Student's IEP based on her needs during the 2021–2022 school year, including whether it was appropriate to change the 1:1 nurse to a 1:1 paraeducator?

3. Did the District follow procedures to conduct a timely triennial reevaluation in spring 2022?¹

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 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. 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 disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

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 a free appropriate public education (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).

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.

IEP Amendments: After the annual IEP team meeting for a school year, the parent of a student eligible for special education and the school district may agree not to convene an IEP team meeting for the purposes of making changes to the IEP, and instead may develop a written document to amend or modify the student's current IEP. If changes are made to the student's IEP the school district must ensure that the student's IEP team is informed of those changes and that other providers responsible for implementing the IEP are informed of any changes that affect their responsibility to the student. Changes to the IEP may be made either by the entire IEP team at an IEP team meeting, or by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated. 34 CFR §300.324; WAC 392-172A-03110.

¹ OSPI placed Issue 3 in abeyance as OSPI received notification that the District had filed a due process hearing request in response to the Parent's request for an independent educational evaluation (IEE). As of the date of this decision, the due process was ongoing, and Issue 3 remained in abeyance.

FINDINGS OF FACT

Background

1. At the start of the 2020–2021 school year, the Student was eligible for special education services under the category of other health impairment and was in the second grade. The Student attended school remotely during the 2020–2021 school year through the District’s virtual academy.
2. In March 2021, the Student’s individualized education program (IEP) team met and developed the Student’s IEP. The March 2021 IEP included information that due to the Student’s seizures, the Student required a “1:1 LPN to be with her to and from school (and virtually due to COVID closure/hybrid) on the bus, as well as with her throughout the school day in order to monitor seizures and administer needed medication.” The IEP included 1:1 nursing as related services and supplementary aids and services.

The Student’s IEP included goals and specially designed instruction in the areas of writing, math, and communication. The IEP included occupational therapy as a related service and 1:1 nursing provided by a nurse for 1,950 minutes per week in the general education setting as a supplementary aid and service.

3. In her complaint, the Parent alleged the District failed to post and hire for the 1:1 nurse position in the spring of 2021.

Health Needs/Plan & Medical Orders

4. The Student has medical conditions, including epilepsy, that cause seizures and along with her IEP, the Student has a health plan that facilitates the Student’s access to education. The health plan referenced the nurse as the main staff person involved with documenting seizures and administering medication.
5. The District’s nursing administrator (who is a registered nurse and familiar with the Student’s health needs) noted the Student’s health plan involves a “two-pronged approach” that included medication to manage immediate symptoms and monitoring to document seizure episodes. The Student’s seizures are monitored via a seizure log that identifies the date, location, individuals who observed, preceding events, symptoms, subsequent events, and other notes.
6. The Student’s previous 2019 evaluation noted in the health history and educational implications section that the Student’s “medication is not delegated to unlicensed staff” and her “seizure protocol is complex regarding the parameters for the administration of her emergency medication for different types of seizures. Due to this, she has a 1:1 nurse.”
7. The District noted in its response that the Student’s “health care orders called for the administration of medication, usually midazolam to be administered intranasally at seizure

onset and that the orders, either do not specify who must administer the medication or specify: 'This/these medication(s) may be administered by an employee designated by or pursuant to school board policies.'" The Student also received ibuprofen orally.

The medical recommendations and medical orders included in the District's response provided the following:

- A 2019 medical recommendation—for the Student's seizure action plan—addressed medication and observing the Student. The recommendation did not specify or recommend a particular person to administer the medication.
 - A 2020 physician's order for medication at school—for the Student's migraines—noted that "medication will be dispensed by the principal or his/her designee if the school nurse is not present. The principal will designate the person responsible to dispense medication on an individual basis."
8. The District stated the Student has been historically supported by a licensed practical nurse (LPN or nurse). However, the District stated the District nursing administrator has "opined that the support could be delegated to a trained individual who was not a nurse, such as a 1:1 paraeducator." The District stated it had the personnel available to support the Student during the 2021–2022 school year, but that the Parent "expressed a preference for LPN support." The District also stated it has "never received medical orders directing that the Student be monitored and medication be administered only by an LPN."
9. The District stated that pursuant to OSPI guidance for medication administration, a registered nurse may delegate medications for the treatment of seizures when the medication is given orally, topically, via eye drops, ear drops, or nasal spray. Parents of students with epilepsy are also able to select a "parent designated adult" (PDA) to provide parent-directed nursing care in school. A PDA is a volunteer who may be a district employee who receives additional training from a healthcare professional or expert in epileptic seizure care, selected by the parent.
10. In her interview, the Parent stated it was not just that she preferred a nurse, but that the Student had a medical need for the nurse. The Parent stated there is a letter from the Student's doctor that specifies the Student needs to be within eyeline or hearing distance of a "medically trained person" that can administer medications and perform CPR as required. The Parent noted this language was crafted such that it was not sufficient to have a "medically trained person" just in the building, but within eyeline or hearing distance.

The Parent stated that the District told her that because the nurse was written into the IEP, the Parent only needed to get a letter from the doctor every three years. Further, the goal was to have a "medically trained person" responsible for observing and monitoring the Student for seizures, and that they did not want the academic staff responsible for this because she needs to be monitored all the time. The Parent stated that the Student's symptoms change as she gets older, and this was another reason the doctor stated a medically trained person should be the one monitoring the Student.

11. In an interview with the Student's previous 1:1 nurse—a registered nurse who served as the Student's 1:1 nurse from the time the Student was in kindergarten through the end of the 2020–2021 school year—OSPI asked the nurse her opinion on whether the Student's 1:1 support had to be provided by a nurse or whether a trained paraeducator could fill the role. The nurse replied that the answer was complicated. She stated that when she worked with the Student, her opinion was that the support did need to be provided by a nurse due to the specifics of the Student's needs. For example, the nurse stated, the Student has several types of seizures, with different triggers, and that present differently. The person providing support has to know how the seizure is presenting and what type of seizure, in order to assess whether and what medication is warranted. The nurse stated that this really is a nursing assessment as to the symptoms, presentation, and medication.

However, the nurse stated that it is possible a paraeducator could do this if they were trained, spent time getting to know the Student, understood the nuances of her needs, and if a doctor felt the support could be provided by someone who was not a nurse.

2021–2022 School Year

12. At the start of the 2021–2022 school year, the Student continued to be eligible for special education services and her March 2021 IEP was in effect.
13. On September 3, 2021, a District director of behavioral health emailed District staff regarding the fact that the Student needed a 1:1 nurse, that the position was still unfilled, and that the Parent would be “acting as her 1:1 for now.”
14. September 7, 2021 was the first day of the 2021–2022 school year in the District.
15. According to the Parent's complaint, there was no 1:1 nurse for the Student at the start of the school year and thus the Student could not attend school in person.

According to the District, the Parent opted to have the Student participate in the District's virtual academy.

16. In an interview with the Parent, she stated the Student did want to stay in the District's virtual academy for the 2021–2022 school year; however, the Parent stated their request was denied because the Student had a 1:1 nurse. The Parent stated the District told them that the Student had to attend in person because she had a 1:1 nurse. The Parent stated this was frustrating and confusing as the Student had been doing well in the virtual academy and the District did not have staff to provide the 1:1 nurse in-person anyway.
17. On September 8, 2021, the Student's IEP team amended her IEP. The September 2021 IEP continued to include that due to the Student's seizures, the Student required a “1:1 LPN to be with her to and from school (and virtually due to COVID closure/hybrid) on the bus, as well as with her throughout the school day in order to monitor seizures and administer needed

medication.” The IEP included 1:1 nursing as related services and supplementary aids and services.

The Student’s IEP included goals in the areas of writing, math, and communication, with progress reporting at the semester. The IEP included several accommodations and the following specially designed instruction and related services:

- Math: 100 minutes per week (provided by a general education teacher in the general education setting)
- Writing: 100 minutes per week (provided by a general education teacher in the general education setting)
- Communication: 30 minutes per week (provided by a speech language pathologist (SLP) in the special education setting)
- Occupational Therapy (related service): 30 minutes per week (provided by an occupational therapist (OT))
- Transportation (related service): 600 minutes per week (special education transportation)
- 1:1 Bus Nurse: 600 minutes per week (provided by a nurse on the special education transportation)

The IEP also included 1:1 nursing provided by a nurse for 1,950 minutes per week in the general education setting as a supplementary aid and service. The IEP indicated the Student would spend 96.7% of her time in the general education setting.

18. According to the District’s response, the Parent sought to have the Student participate in some in-person instruction in the fall of 2021, and the District noted as the IEP included nurse support, the District “sought to obtain an LPN to fill the position.” The District noted it originally posted the position in June 2021 but was unable to fill the position until November 2021.²

The District stated that pending hiring a nurse, the District worked with the Parent to identify a way to serve the Student and that it offered the Student 1:1 tutoring “to ensure instructional materials were addressed and the Student understood her assignments” and continued to provide specially designed instruction and related services.

Several weeks into the school year, the District and Parent agreed to have the Student join the general education class for the last hour of the day and then stay for an hour after school for tutoring, which was originally offered three times a week and then increased to four times a week.

The District stated it “arranged to allow the Parent to act as the 1:1 and accompany the Student to the [school]” and further stated the Parent offered/requested to accompany the Student to school. The District stated the speech and occupational therapy services were offered in-person. However, the District noted “the Student missed several service and tutoring appointments” due to Parent or Student unavailability.

² OSPI notes the District provided information that it diligently sought to hire a nurse, worked with employment agencies, posted the position in various places, and attempted to directly recruit nurses.

The District stated its response that all services in the Student's IEP were offered remotely. The District stated, and emails confirmed, that when:

District personnel were unable to meet when regularly scheduled, the District made efforts to reschedule and provide the service minutes as identified in the IEP. Even when the Student was not available due to a Parent conflict, such as dentist appointment or other barrier, the District worked with the Parent to ensure that the Student received her full service minutes.

According to service logs, the Student was scheduled to receive services from the SLP September 2021 through March 2022 as follows:

- Student received services: October 4, October 12 (late), October 18, October 19, November 2, November 30, and December 6
- Student absent: September 17, November 16, November 23, December 13, January 1, January 17, January 25, February 1, February 8, February 15, March 1, March 8, and March 22
- Other: September 24 professional development, October 26 half day, November 9 power outage, January 3 2-hour delay, February 21 waiver day, March 8 SLP absent

According to service logs, the Student was scheduled to receive services from the OT September 2021 through March 2022 as follows:

- Student received services: October 13, October 19, November 2, and November 30
- Student absent: October 5, October 6, November 16, December 15, January 5, and January 12
- Other: October 26 half day, November 9 school cancelled, November 9 no school

District emails also documented that the general education teacher emailed the Parent work packets for the Student, Zoom links to classroom meetings, math lessons, links to an online math program, and reading assignments.

19. In the Parent's complaint and in an interview, she stated the plan described above was the only time the Student received services, and this only happened when the Parent could get the Student to school.

The Parent also stated she asked for math tutoring after school in October and November 2021. This was initially planned, but the tutor had a family conflict and could no longer tutor the Student. The Parent stated the tutor was never offered again, although the "school offered to have a teacher go to the [Student]s home for one hour a week, in order for the teacher to drop off homework sheets, give instructions on the worksheets dropped off and pick up worksheets from the week before."

The Parent noted the District did not provide transportation because it did not have a 1:1 nurse, nor did the District reimburse the Parent for transportation or compensate her for acting as the Student's 1:1 when the Parent was able to bring the Student to school.

The Parent also stated in her interview that this was the first year the Student was supposed to access special education services in a push-in model, in the general education classroom, which the Parent stated was something she really advocated for. So, the Parent stated that the Student has also missed out on a lot of general education time this school year.

20. On September 21 and 22, 2021, the District and the tutor emailed regarding setting up tutoring for the Student on Mondays, Tuesdays, and Fridays for an hour after school.

21. On September 24, 2021, tutoring services for the Student began.

The District noted in its response that the Parent only made the Student available for six of the tutoring sessions and "had the Student been made available all of the scheduled tutoring dates, the Student would have had at least 28 tutoring sessions (4 days a week for 7 weeks)."

22. On November 15, 2021, the District hired a 1:1 nurse. According to the District's response, the Parent "expressed [a] dislike of the LPN hired by the District." The District noted the nurse underwent training and met the Student and Parent, but ultimately resigned on December 28, 2021. The District reposted the position for the nurse and the tutor.

23. According to the Parent, she was uncomfortable with the nurse when she and the Student met the nurse because the nurse did not speak to the Student nor did the nurse have any questions for the Parent, which the Parent thought was unusual.

The Parent stated that the Monday following their meeting, when the nurse was supposed to start, the nurse texted the Parent, stating she had a family emergency and would not be able to start that day. The Parent stated she was primarily concerned because the nurse then requested leave for an undetermined amount of time and the Parent was not clear if or when the nurse would start, and if or when the Student would be able to come to school. The Parent stated this made the Student upset because she had been excited about going back to school. The Parent stated following this, she was in limbo and was not sure how they would have a working relationship with the nurse.

24. On November 17, 2021, the Student's tutor emailed the Parent and District that she was unable to continue the tutoring due to several family emergencies and thus, she was no longer available after school.

25. A December 2, 2021 children's hospital seizure management care plan included in the District's response noted that, "In the school setting, an RN or other personnel, per school policy, may administer the Emergency Medicine. If the student is on the school bus or if an appropriate person is not available in the school, then 911 should be called and paramedic requested to give Emergency Medicine per order."

26. The District was on break from December 20–31, 2021.

27. On January 11, 2022, the Student's IEP team met and amended her IEP. The nurse administrator provided the team with information about how the District could meet the Student's medical needs. The nurse administrator stated that the Student could be served by a 1:1 paraeducator trained to look for signs of the Student's seizures, document information, and administer medication.

The January 2022 IEP continued to state that due to the Student's seizures, the Student required a "1:1 LPN to be with her to and from school (and virtually due to COVID closure/hybrid) on the bus, as well as with her throughout the school day in order to monitor seizures and administer needed medication." The Student's IEP included the same goals, minutes of specially designed instruction, and minutes of occupational therapy. The other related and supplementary aids and services were amended as follows:

- Transportation (related service): no amount specified
- 1:1 Paraeducator (supplementary aids and services): 1,825 minutes per week (provided by a paraeducator in the general education setting)
- 1:1 Paraeducator (supplementary aids and services): 225 minutes per week, concurrent (provided by a paraeducator in the special education setting)

The IEP indicated the Student would spend 96.7% of her time in the general education setting. The IEP noted the Student, due to her disability, "has a one-on-one paraeducator with her in all school environments including the bus."

The prior written notice, documenting the meeting and IEP amendment, noted that the "District proposed 1:1 Para would be sufficient for the level of support that [Student] needs within the general education classroom. [Nurse administrator] will be training the 1:1 para-professional to administer medication under delegation." The prior written notice did not indicate there was disagreement with this decision.

28. The Parent stated she initially agreed with the change to the paraeducator because the Student would not be able to come to school otherwise. The Parent stated the District presented this option to her as the option to get the Student back to school. The Parent stated that she understood this to be a temporary measure until a nurse could be hired, and that the District could not hire a paraeducator until the IEP indicated a need for a paraeducator.

29. According to the District's response, the Student's medication and supervision needs did not require an LPN and the District's nursing administrator recommended that the team consider a 1:1 paraeducator who would be trained and supervised by the nurse administrator to support the Student. The District further stated in its response:

RCW 28A.210.260 permits the Registered Nurse to delegate certain nursing care and medical tasks to non-credentialed, unlicensed assistive personnel who are school employees in public and private K-12 schools pursuant to District policies. The District's policy 3416³ specifies that the authorized staff members are permitted to administer medications pursuant to a written request from a licensed health professional for medications administered orally, topically, via eye drops, ear drops, or nasal spray. The administering individual will also be trained and supervised by the registered nurse.

³ Policy 3416 notes that if a student receives prescribed medication from an authorized staff member, the parent "must submit a written authorization accompanied by a written request from a license health professional prescribing within the scope of his or her prescriptive authority." Additionally, the policy noted that "medications other than oral or topical medications, eye drops, ear drops or nasal spray such as suppositories or non-emergency injections may not be administered by school staff other than registered nurses or licensed practical nurses."

30. On February 9, 2022, the Student's IEP team met to discuss the Student's triennial reevaluation. The District stated in its response that the Parent did not raise any concerns about the January 2022 IEP team decision regarding the paraeducator.

31. The February 9, 2022 IEP indicated on the cover page, and in the prior written notice, that the Parent gave permission via phone to proceed without a meeting.

The IEP noted the Student "has been attending [elementary school] this year in...3rd grade class. [Student's] attendance has been limited due to 1:1 position unfilled and parent availability to support at school being limited." The IEP indicated the Student's triennial reevaluation was pending and that the IEP would be further updated following the reevaluation.

The Student's IEP goals remained the same, although the end date for the goal was updated from March 2022 to February 2023. The present levels included notes that the Student's progress was limited "due to shortened school day." The minutes of special education services also remained the same, with the service matrix updated through February 2023.

The prior written notice, documenting the IEP update, indicated the Student's annual IEP was due and that "due to shortened school days data was unable to be collected to write new goals and update present levels. A new Evaluation is currently being completed...New goals and present levels will be written at that time."

32. In late February 2022, the District hired a paraeducator and the nurse administrator began to train the paraeducator in recognizing the Student's seizures, taking records, and administering records. The nurse administrator noted the Parent participated in the training process and attended a training session with the nurse administrator and paraeducator.

33. The Parent stated in the interview that following the hiring of the paraeducator, the Student had an appointment with her doctor who suggested that the IEP team did not have the authority to change the language in the IEP from an LPN to a paraeducator because the 1:1 nurse was based on a doctor letter/doctor order. The doctor also suggested that you cannot opt out of a service like a nurse, just like you cannot opt out of services like occupational or speech therapy.

The Parent stated that following this appointment, she realized she did not agree with the change to the paraeducator. The Parent stated she called the nurse administrator and shared her concerns, and that the nurse administrator stated they could hire an LPN if the Parent was not comfortable with a paraeducator; the wording on the IEP would just need to be switched back to an LPN.

34. On March 11, 2022, OSPI received and opened this complaint. In the complaint, the Parent raised the following concerns related to IEP implementation and amendment procedures, summarized:

- The IEP does not reflect and has not been amended to reflect the reality of the education the Student has received during the 2021–2022 school year.
- The Student has not attended school due to staffing issues for the majority of the 2021–2022 school year and no compensatory education services have been offered.
- Any educational services the Student has accessed is because the Parent has been acting as the Student's 1:1 and providing accommodations. The only educational services accessed have been through "Canvas" assignments and videos, no in-person instruction provided.⁴
- The Student has not received occupational or speech therapy services unless the Parent took the Student into the school for those services in-person.
- The IEP was improperly amended to replace the 1:1 nurse with a 1:1 paraeducator.

35. In mid-March 2022, the District hired an LPN and hired a tutor. The District stated it was prepared to start the 1:1 nursing services on March 29, 2022.

36. On March 23, 2022, the District director of special services (director) and Parent met and discussed the availability of the tutor and nurse. The District also stated it offered to amend the IEP and provide 48-112 hours of compensatory services for any services missed due to District personnel unavailability.

The District noted it also, with the Parent's agreement, amended the Student's IEP without an IEP meeting to designate the 1:1 support as being provided by an LPN rather than a paraeducator.

37. The March 23, 2022 IEP amendment, based on the Parent and director's conversation, changed the 1:1 paraeducator services to:

- 1:1 RN/LPN: 1,825 minutes weekly in the general education setting provided by a 1:1 LPN
- 1:1 Bus LPN: 225 minutes weekly in the special education setting provided by a paraeducator

38. Regarding the IEP amendment, in additional information provided by the Parent, she stated she only agreed to amend the IEP without a meeting because she understood that the IEP was to "revert back to the 09-2021 amended IEP." The Parent stated the paraeducator is still responsible for providing services on transportation instead of a 1:1 nurse.

39. A March 24, 2022 email from the director indicated the training for the LPN was scheduled for March 29, 2022.

40. On March 28, 2022, the director emailed the Parent a copy of the March 23, 2022 IEP amendment and requested that the Parent provide an updated letter from the Student's doctor, supporting the need for a 1:1 nurse.

⁴ The Parent further provided in her interview that the Student struggled to access Zoom sessions with her class, in part because there was no 1:1 monitoring her while she was on screen. The Parent also stated that once the Student had started to go into the classroom, in-person in the fall for some time, the Student was resistant to being on Zoom because she wanted to be in-person with her peers.

41. According to the Parent, the Parent and Student met with the new nurse on March 28, 2022 and that the nurse and Student started attending school on April 4, 2022.
42. The District, in its response, stated that it did not materially fail to implement the Student's IEP, the Student has not been denied a free appropriate public education (FAPE), and the Student has made progress. Regardless, the District stated that in an effort to resolve the matter, the District has offered the Parent up to 112 hours of compensatory education in person at the District. The Student can access those services through the District's robust summer programming.

CONCLUSIONS

Issue One: Individualized Education Program (IEP) Implementation – The Parent alleged the Student's IEP has not been implemented and the Student has not been able to attend school during the 2021–2022 school year due to the lack of 1:1 nurse.

At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services and must provide 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 student'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 Student's IEP and health plan, in place at the start of the 2021–2022 school year, established that the Student required a 1:1 nurse who supported the Student's needs related primarily to her seizure disorder—including monitoring for seizures and giving medication as needed. The Student's IEP included specially designed instruction in math, writing, and communication, and occupational therapy as a related service. In advance of the 2021–2022 school year, the Parent was told the Student could not continue in the District's virtual academy during the 2021–2022 school year because the Student had a 1:1 nurse and thus needed to attend school in person, but that the 1:1 nurse position had not yet been filled and so the Student could not attend school in person either. The District did not have a 1:1 nurse for the Student and the Parent stated, and documentation supported, that the reason the Student could not attend school in person was due to the lack of nurse; although, OSPI notes the District did work to hire a nurse and was faced with staffing shortages and issues of staff, once hired, who had emergencies and then had to go on leave.

The Student was able to access some instruction through an arrangement wherein the Student was scheduled to attend her general education class for the last hour of the day and then stayed for an hour of tutoring after school, three to four days per week. During this time, the documentation supports that the Student had some access to instruction, including some speech and occupational therapy sessions and some after school tutoring. However, OSPI notes that these services were largely dependent on the Parent being able to bring the Student to school—as transportation was not provided by the District—and the Parent remained with the Student, acting

as the 1:1. The District also provided the Student with access to work packets, classroom meetings via Zoom, and other online lessons and assignments. However, the Parent noted these methods of instruction were increasingly inaccessible to the Student as she began to refuse to engage with remote instruction. While OSPI commends the District for attempting to work out how to provide the Student with access to instruction while in the process of hiring a 1:1 nurse, OSPI notes there were flaws with the plan. Primarily, the plan was improperly dependent on the Parent being able to bring the Student to school, providing the transportation, and acting as the 1:1, which meant the instruction was not being provided at public expense.

The District stated that all services in the Student's IEP were offered remotely, and that District staff worked to provide services around the Student's schedule.⁵ Services were offered and staff did attempt to work around the Parent's schedule; regardless, as the services were dependent on the Parent providing access, the Student was overall provided instruction that fell short of what was required in the IEP. Additionally, the District acknowledged in other documentation that services were missed due to District personnel unavailability and offered compensatory education to the Parent. OSPI finds the Student's IEP was not materially implemented due to the District's lack of 1:1 nurse, which prevented the Student from fully attending school. While OSPI recognizes the staffing challenges the District faced, which were not entirely within the District's control, the fact remains that the Student was unable to access education for most of the school year.

The staffing issues were not fully resolved until April 2022. While the District hired a nurse in mid-November 2021, the documentation in the complaint indicates that this nurse never worked with the Student, in large part because the nurse had a family emergency and almost immediately went on leave before finally resigning at the end of December 2021. In January 2022, the IEP was amended so that the support could be provided by a paraeducator (see below discussion) and a paraeducator was hired in late February 2022. The Parent changed her mind about the services being provided by a paraeducator, the IEP was amended again, and ultimately a nurse was hired and the Student started attending school at the beginning of April 2022 with 1:1 nurse support.

OSPI finds a violation as the Student's IEP was not materially implemented. There were approximately 24 weeks between the start of the school year and filing of this complaint on March 11, 2022. This means, based on the Student's September 2021 IEP, the Student missed approximately 104 total hours of instruction: 40 hours of math instruction, 40 hours of writing instruction, and 12 hours each of communication and occupational therapy. The District offered between 48 and 112 hours of compensatory services. OSPI accepts the District proposed corrective action and given that the Student did have access to some instruction through tutoring and some speech and occupational therapy, the District will be required to provide 100 hours of compensatory education.

⁵ The District also stated that the Student has made progress and this supports the fact that the Student was not denied a FAPE. However, OSPI notes the District did not submit any progress reporting, and in fact, the Student's February 2022 IEP included the same, repeated IEP goals from the previous IEP, noting the Student's attendance had been limited and there was no data to support updated goals and present levels. Thus, it is not clear the Student made any progress. Notably though, the Student is undergoing her triennial reevaluation, which should provide updated progress data.

Issue Two: IEP Amendment – The Parent alleged the District improperly amended the Student’s IEP to change the 1:1 nurse support to 1:1 paraeducator support, and that the IEP was not amended to reflect the reality of the education the Student received during the 2021–2022 school year.

First, OSPI notes that it does not necessarily advocate amending an IEP to decrease the services a student is receiving on an IEP due to staffing shortages if the student still requires those services to access a FAPE. The IEP should reflect the offer of FAPE and be based on the student’s unique, disability-related needs. Thus, here, OSPI does not find a violation based on the fact that the IEP was not amended to reflect the services the Student was receiving.

IEP Amendment Procedures: After the annual IEP team meeting for a school year, the parent of a student eligible for special education and the district may agree not to convene an IEP team meeting for the purposes of making changes to the IEP, and instead may develop a written document to amend or modify the student's current IEP. The IEP can also be amended through an IEP meeting as needed.

On January 11, 2022, the Student’s IEP team met and amended her IEP to change the 1:1 nurse to a 1:1 paraeducator. At the time of the meeting and a later meeting to discuss the triennial reevaluation, the Parent did not disagree with the decision. Although, the Parent stated she felt the amendment was the only option to get the Student back to school. Later, following an appointment with the Student’s doctor, the Parent changed her mind and felt that the IEP amendment was not appropriate and that the support could not be provided by a paraeducator. OSPI finds the District followed IEP amendment procedures with respect to the January 2022 amendment.

The Parent expressed her concerns to the District nurse administrator and following a conversation with the District’s director of special services, the IEP was amended to change the support back to being provided by a nurse without an IEP meeting. The Parent noted, however, that she only agreed to amend the IEP without a meeting because she understood that the IEP was to “revert back to the 09-2021 amended IEP.” The Parent stated, and the March 2022 IEP amendment indicated, the paraeducator was still listed as responsible for providing services on transportation instead of a 1:1 nurse. Thus, while OSPI finds the District largely followed IEP amendment procedures, the March 2022 IEP was not actually amended as the Parent thought it would be based on her discussion with the director. Thus, OSPI finds a violation as the IEP was not amended as the Parent and director agreed it would be. The Student’s IEP team will meet to revisit the nursing services and ensure the services are accurately documented in the Student’s IEP.

Appropriateness of the Amendment: When developing each student’s IEP, the IEP team must consider the strengths of the student, the concerns of the parents for enhancing the education of their student, the results of the initial or most recent evaluation, and the academic, developmental, and functional needs of the student. Here, the facts with respect to whether it is appropriate to have the 1:1 service provided by a nurse or a paraeducator are mixed. The documentation is clear that historically, this service has been provided by a nurse.

The Student's previous IEPs, health plans, and evaluation all included language referring to a 1:1 nurse (or LPN)—for example—the March 2021 and subsequent IEPs included the following language: the Student required a "1:1 LPN to be with her to and from school (and virtually due to COVID closure/hybrid) on the bus, as well as with her throughout the school day in order to monitor seizures and administer needed medication;" and, the health plans referred to the person responsible as a nurse, as did the 2019 evaluation. The Parent stated that the Student has a medical need for a nurse and that she has a letter from the Student's doctor that specifies the Student needs to be within eyeline or hearing distance of a "medically trained person" that can administer medications and perform CPR as required. The Parent noted this language was crafted such that it was not sufficient to have a "medically trained person" just in the building, but within eyeline or hearing distance. The Student's previous District 1:1 nurse stated that given the Student's specific needs, the 1:1 nurse felt that the support needed to be working with a nurse when she was working with the Student. However, the prior 1:1 nurse also stated it was possible a paraeducator could be trained to do this if they spent time getting to know the Student, understood the nuances of her needs, and if a doctor felt the support could be provided by someone who was not a nurse.

On the other hand, the health care orders/doctor orders included in the District's response do not all specify that the 1:1 support must be provided by a nurse. For example, a 2019 medical recommendation for the Student's seizure action plan did not recommend a particular person to administer medication and a December 2021 hospital seizure management plan included in the District's response noted that, "In the school setting, an RN or other personnel, per school policy, may administer the Emergency Medicine." State regulations and OSPI guidance do allow certain nursing care tasks to be delegated to district employees who are trained and supervised by a nurse, which includes the administration of medications such as the Student's. The District's current nurse administrator has "opined that the support could be delegated to a trained individual who was not a nurse, such as a 1:1 paraeducator;" hence, the team's decision to amend the IEP support in January 2022 and change to a paraeducator providing the support.

Overall, the documentation is not conclusive that this support must be provided by a nurse. Thus, OSPI does not find the IEP amendment to be inappropriate and finds no violation. And again, the District was responsive and amended the IEP again when the Parent disagreed with the support being provided by a paraeducator. But, given that the IEP team is required to meet per the above, OSPI strongly recommends the Parent get an updated letter from the doctor if the Student's doctor believes the services must be provided by a nurse and that the IEP team consider the Student's specific medical needs.

CORRECTIVE ACTIONS

By or before **June 3, 2022, August 31, 2022, November 15, 2022, January 31, 2023, and May 3, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **May 27, 2022**, the District and Parent will develop a schedule for 100 hours of compensatory education, divided as follows:

- Math: 39 hours
- Writing: 39 hours
- Communication: 11 hours
- Occupational therapy: 11 hours

Unless otherwise agreed to by the District and Parent, services will be provided by a certificated special education teacher or related service provider. Services may be provided in a 1:1 setting or a group setting, if appropriate. Services will be provided outside the District's school day and can be scheduled on weekends, over District breaks, or before or after school. The compensatory services can be provided through a District summer program, if that program will provide specially designed instruction in the Student's areas of service. The District will provide OSPI with documentation of the schedule for services by or before **June 3, 2022**.

If the District's provider is unable to attend a scheduled session, the session must be rescheduled. If the Student is absent, or otherwise does not attend a session without providing the District or provider with at least 24 hours' notice of the absence, the session does not need to be rescheduled. The services must be completed no later than **April 28, 2023**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **August 31, 2022, November 15, 2022, and January 31, 2023** of the compensatory services provided to the Student at that point. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **May 3, 2023**, the District must provide OSPI with documentation that it has completed compensatory services for the Student.

The District either must provide the transportation necessary for the Student to access these services or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **May 3, 2023**.

IEP Meeting

By or before **May 27, 2022**, the Student's IEP team will meet to revisit the nursing services and ensure the services are accurately documented in the Student's IEP. OSPI recommends the Parent provide the IEP team with any updated medical orders or doctor letters for review. The IEP team should consider those, alongside the Student's specific needs.

By or before **June 3, 2022**, the District will provide OSPI with the following documentation: a) any relevant meeting invitations, b) a prior written notice, summarizing the IEP team's discussion and decisions; c) a copy of the IEP; and, d) any other relevant documentation.

DISTRICT SPECIFIC:

None.

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 ___ day of May, 2022

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.)