

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-137

PROCEDURAL HISTORY

On November 18, 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 [REDACTED] 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 November 22, 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 December 5, 2022, OSPI requested additional information from the Parent. That information was provided by the Parent on December 6 and 7, 2022. The information was forwarded to the District on December 7 and 8, 2022.

On December 5, 2022, the OSPI complaint investigator conducted a telephone interview with the Parent.

On December 6, 2022, the District requested an extension of time to submit its response. On the same day, OSPI partially granted that request. OSPI required some of the relevant documents to be submitted by December 9, 2022, and allowed other relevant documents to be submitted by December 16, 2022.

On December 9 and 12, 2022, the Parent responded to questions asked by OSPI. OSPI forwarded that information to the District on December 14, 2022.

On December 9 and 16, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on December 19, 2022. OSPI invited the Parent to reply.

On December 20, 2022, the District responded to questions asked by OSPI. OSPI forwarded that information to the Parent on December 21, 2022.

On January 3, 2023, OSPI received additional information from the Parent and the Parent's reply to the District's response. OSPI forwarded it 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.

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on November 19, 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.

ISSUE

1. During the 2022–2023 school year, has the Student’s individualized education program (IEP), specifically nursing and paraeducator services, been implemented appropriately?

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. 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 [child with a disability] and those required by the IEP.” *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

FINDINGS OF FACT

2021–2022 School Year

1. On September 7, 2021, the District held its first day of instruction for the preschool program. The Student attended a District school as a preschool student and was eligible for special education services under the eligibility category multiple disabilities. The Student’s August 12, 2021 IEP was in effect.
2. The Student’s August 12, 2021 IEP provided specially designed instruction (SDI) and related services in:
 - Adaptive: 71 minutes/4 times per week (provided by a special education teacher, in a special education setting)
 - Social/Emotional: 71 minutes/4 times per week (provided by a special education teacher, in a special education setting)
 - Speech Language: 20 minutes/6 times per month (provided by a speech language pathologist (SLP), in a special education setting)

The IEP also included nursing support for 680 minutes per week.

Under the “Medical-Physical” section of the IEP, it stated:

[The Student] has a tracheostomy with a passy muir valve which supports some verbal communication. He has not required ventilation for waking or sleeping hours for about 6 months. He still has a GJ tube to supplement his oral intake.

...

[The Student] requires the availability of oxygen at all times though does not often need to use it. He requires frequent suctioning with saline drops placed as often as every 30 minutes. He generally needs to be suctioned 1-2 times each night while sleeping. He currently has a part-time 1:1 nurse to assist the parents 2 days a week.

...

[The Student] requires 1:1 nursing care, including on the bus, during school hours to manage his complicated medical needs which include all needed respiratory care as well as nutritional, hygiene, and safety needs.

3. In these facts, there will be references to five different individuals who have served as the Student's personal nurse during the Student's school hours. Those five individuals will be referred to as N1, N2, N3, N4 and N5.
4. N1 began working with the Student three years prior to preschool. N2, N3, N4, and N5 began working with the Student during preschool.
5. The Student attended preschool on Mondays, Tuesdays, Thursdays, and Fridays from 9:15–11:50 am. N1 attended school with the Student on Tuesdays and Thursdays, and N2 attended school with the Student on Mondays and Fridays.
6. On May 31, 2022, the IEP team met and amended the Student's IEP. The IEP provided SDI and related services in:
 - Adaptive: 71 minutes/4 times per week (provided by a special education teacher, in a special education setting)
 - Social/Emotional: 71 minutes/4 times per week (provided by a special education teacher, in a special education setting)
 - Speech Language: 20 minutes/6 times per month (provided by an SLP, in a special education setting)

The IEP added a 1:1 paraeducator for 680 minutes per week and included nursing support for 680 minutes per week.

2022–2023 School Year

7. On September 6, 2022, the Parent informed the District that N1 was no longer available to be the Student's 1:1 nurse.
8. On September 9, 2022, the District informed the Parent that N2 was no longer available to be the Student's 1:1 nurse, but the District was able to find a replacement (N3).
9. On September 13, 2022, the District held its first day of instruction for the preschool program for the 2022–2023 school year. The Student's May 31, 2022 IEP was in effect. The Student was scheduled to attend preschool on Mondays, Tuesdays, Thursdays, and Fridays from 9:15-11:50 am.

At 7:12 am, an internal District email stated, in part: "N3 should be in today. I have requested that she arrive at 8:45am."

At 8:48 am, the following email was sent to the Student's team: "[N3] is on her way as soon as possible, but will be delayed. She should be in by 10 am at the latest."

At 1:34 pm, the District emailed the Parent the following:

I apologize for the challenges this morning as I learned that there were issues with the communication from our partner agency regarding the para and the nurse. The agency communicated with our department, after we clarified start and end times for [Student's] school day of the changes in their schedules today. The para had a conflict that I was unaware of and the communication to the nurse wasn't clear from her agency. We have reiterated the start and end times for the nurse and paraeducator, leading me to assume that Thursday will operate as it should for the full school day. We have clarified the need for immediate and supportive communication. Communication will be sent to you and your family as soon as we are notified and in a consistent manner.

10. On September 17, 2022, the Parent emailed the District, in part, "We do not feel that [N3] is the right nurse for [the Student's] care...we request that [N3] not continue on his case. We ask the [District] to request a new nurse."

11. On September 21, 2022, the Parent emailed the District, in part, the following message:

When the [N3] finally does show up, she shows up with one of the strongest cigarettes smells I've ever smelled. If one of you guys had read [Student's] medical records, you would know that he has lung disease, and we keep him away from any tobacco smell because it can cause asthma like symptoms...

As I'm showing [N3] [the Student's] medical equipment, she says, 'I don't know this ventilator.' I thought she would at least know how to turn it on. SHE HAD NO CLUE. You claimed she was fantastic and had trach/vent training.

12. On September 22, 2022, at 10:17 am, the Parent emailed the District, in part, "We've asked you to remove the nurse [N3] from [the Student's] case. . .We are asking you to not send her tomorrow."

At 12:09 pm, a member of the Student's team sent the following email:

I want the team to be aware that classroom staff have big concerns about the nurse in question. We are keeping daily data in the classroom I am happy to share with the team. At this time I do not feel [the Student] is safe in the classroom unless a parent or a new nurse is with him in case of medical emergency.

At 5:55 pm, the District sent the following internal email: "We are moving forward with replacing the current nurse hired to support [the Student]."

13. On September 29, 2022, the parties had a meeting and the prior written notice (PWN) stated:

The team met and discussed concerns around the current nurse [N3] in the classroom. Concerns were expressed by parents and classroom staff and notes were taken...Parents were told that the district is in process of replacing the current nurse and exploring immediate options for a sub or in district nurse coverage...The current nurse [N3] will no longer be working with Student. The team will follow up once more information is known.

The team is hoping to solve the expressed concerns quickly and as a team to support [the Student's] access to school.

14. On September 30, 2022, the District informed the Parent that a replacement nurse (N4) was found for the Student.
15. On October 4, 2022, at 7:30 am, the District sent the following email: "[N4] supporting [the Student] starting 10/6 will arrive...today (10/4) at 12pm. She is available for training from 12pm to 1pm today. She will start the regular schedule on 10/6 9:05am to 11:50am with the exception of Wednesdays."

At 6:21 pm, the Parent emailed the District, in part, "We met [N4] today and we liked her. We went over all [the Student's] equipment and she asked good questions about his trach and ventilator. She is an experienced nurse and we appreciate that. We are going to train her couple of more days and then she will be good to go."

16. On October 13, 2022, at 7:18 am, the District emailed the Parent, "The nurse, [N4], supporting [the Student] will not be available today 10/13/2022. A substitute has not been identified at this time. Notification will be provided as soon as services are confirmed to resume."
17. On October 14, 2022, at 9:24 am, the District emailed the Parent, "The nurse, [N4], supporting [the Student] will not be available today 10/14/2022. She will be available to resume 1:1 coverage after additional training has been scheduled."

At 1:50 pm, the Parent replied, in part:

We have been attending class with [the Student] for the past two weeks with the hope that we could come to an arrangement with the nursing situation. Two weeks later and we are still attending school with no prior notice that we wouldn't have nursing. The past two days we have been notified that same morning that [the Student] will not have nursing. I don't know what parent can suddenly change work plans last minute. Do you? All 'communication channels' put together by [the District] have completely failed.

[N4] is clearly not the right fit for [the Student]. We as parents have safety concerns when it comes to her ability to react quickly enough in an emergency. The fact that she has refused to take on the assignment unless she gets further training (after two weeks of us go over and over his care with her) reiterates our safety concerns and tells us she's also not comfortable with his care. On Tuesday she mentioned she was going to ask some of the other para educators to help her keep an eye on him because he runs a lot and fast during recess. If someone had read [the Student's] medical records they would have made it known to her that he is not wheel chair bound and is a pretty active kid that requires constant supervision. She clearly made it known to us that she was not informed what type of client/patient [the Student] is.

We are requesting [N4] be removed from his case. We do not feel safe and comfortable leaving [the Student] under her watch. To be clear...[the Student] has the airway of an infant, if the trach comes out or is pulled out by another child and someone does not react quickly enough it will have dire consequences.

18. On October 17, 2022, at 8:45 am, the Parent emailed the District, "are you guys even checking nursing credentials when they send you a nurse? We looked up [N4] on the Washington state department of health for her credentials and the only [N4] listed has an expired license."

At 8:52 am, the Parent emailed the District, "[the Student] will not be attending school today. Parents are unable to come to school with him and given that the school district has not been able to provide [the Student's] needs when it comes to his nursing needs, we are keeping him home."

19. On October 21, 2022, the District emailed the Parent, "...the nurse candidate [N5] has accepted the offer! She is completing onboarding with the agency now...As soon as I have more information on an official start date, I will update."

20. On October 24, 2022, the Parent emailed the District that the Student would not be attending school because the Parent was unable to attend school with the Student.

21. On October 27, 2022, at 8:32 am, the Parent emailed the District, in part, "Who's supposed to be keeping us in the loop about the nursing situation for my son to be able to attend school?"

22. On October 28, 2022, the Parent emailed the District, "...Not only is the nursing portion not being provided but his para educator is also not showing up."

23. On October 31, 2022, the Parent emailed the District that the Student would not be attending school. The Parent's email stated, in part, "[The District] has not followed through with providing a nurse to be present with [the Student]."

24. On November 1, 2022, Parent emailed the District that the Student would not be attending school because, in part, the District is "not providing the resources listed in his IEP in order for him to be able to attend school."

At 11:03 am, the District emailed the Parent that N5 had a tentative start date of Monday, November 14th.

At 11:47 am, the District emailed the Parent, "As discussed earlier, the district will offer compensatory education for services [the Student] misses due the unfilled nursing position."

25. On November 3, 2022, at 10:42 am, the Parent emailed the District, "[N5] will start on Monday the 14th. So we are planning on meeting her that day at school. In the meantime, [Parent] will try to take [the Student] to school all four days next week."

26. On November 10, 2022, the District emailed the Parent, "There will be a paraeducator here for [the Student] today."

27. On November 14, 2022, the Parent emailed the District, "I need you to call me. It's been two weeks since we interviewed the nurse. [The Student] is going on three weeks of not attending school."

28. On November 16, 2022, at 12:44 pm, the District emailed the Parent that the Student’s new paraeducator began work.

At 5:13 pm, the Parent emailed the District to set up a meeting to discuss compensatory services for the Student.

29. On November 17, 2022, at 3:10 pm, the District emailed the Parent, “The nurse will start tomorrow, Friday 11/18.”

At 8:46 pm, the Parent emailed the District, “[The Student] has a doctor appointment tomorrow morning so he will not attend school. We can meet the nurse on Monday.”

30. On November 18, 2022, OSPI received this complaint from the Parent, alleging that the District had not followed through with providing the necessary resources, specifically a 1:1 nurse, for the Student to attend school.

31. On December 1, 2022, the Parent emailed the District, “Tomorrow...[the Student] will not attend school. We are planning on meeting the new nurse on Monday the 5th.”

32. On December 5, 2022, the Parent emailed the District, “Based on [the Student]’s recent doctor appointments where we discussed [the Student]’s recent respiratory illnesses, we have made the decision to keep [the Student] home for the remainder of the viral season.”

33. On December 12, 2022, the District offered the Parents minute-for-minute compensatory education for all services missed due to the nurse staffing issues. The District also offered to provide compensatory education for the days the Parent attended school with the Student.

34. On December 15, 2022, the Student’s IEP team met to consider input from his medical provider regarding the Student’s heightened respiratory risk during the viral season. The IEP team (with Parents’ agreement) amended the Student’s IEP to provide for home-based instruction for the duration of the viral season. As a result, the Student’s IEP does not provide him with a 1:1 nurse at this time and N5 is not presently scheduled to work with the Student in the new year. The team determined that the Student’s IEP team would meet in February 2023, to determine whether it is medically safe for him to return to in-person learning.

35. According to the District’s attendance records, up until and including November 29, 2022, the Student was absent on October 17, 24, 28, and 31, November 1, 3, 4, 7, 10,14, 15, 17, and 18 because the Student’s 1:1 nurse was not available.

36. According to the District, this school year’s nurses were employed as follows:

Nurse	Length of Employment
3	September 8–29, 2022
4	October 4–11, 2022
5	November 21–December 16, 2022

37. On December 16, 2022, the District submitted its response to the Parent's complaint, which stated, in part:

Student missed 17 days of school due to the absence of a Nurse. The District admits it is obligated to provide compensatory education for these missed days. It has already made this offer to Parents. The District also acknowledges that Parents attended school with Student on a number of days. Although Student did not miss services on those days, the District has offered to provide Student additional compensatory education in recognition of the challenges presented.

38. On January 2, 2023, the Parent sent an email to OSPI, stating, "Our records show we attended school with our son 19 days."

CONCLUSIONS

Issue One: IEP Implementation – The Parent alleged that during the fall of 2022, the District did not provide the Student's 1:1 nursing services as required by the Student's IEP so that the Student could attend school on a daily basis.

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 child with a disability and those required by the IEP.

Here, the Student's IEP provided him with 1:1 nursing services. According to the District, the "Student missed a total of 17 days of school during the fall of 2022 due to the nurse staffing issues." These days, in addition to the 19 days the Student's Parent attended school with the Student to cover for the lack of the Student's 1:1 nurse establishes that the District has materially failed to implement the Student's IEP. Thus, a violation has occurred.

The District has already offered and will be required to provide compensatory education for the days when the Student's 1:1 nurse was not available, causing the Student to miss school. According to the District, "Student missed a total of 17 days of school during the fall of 2022 due to the nurse staffing issues." Each preschool day was approximately 150 minutes or 2.5 hours. Thus, the Student is entitled to 2,550 minutes of compensatory services, which is approximately 43 hours. The parties will need to reach a mutually agreeable schedule outside of the Student's regular school hours for these compensatory education hours. Additionally, according to the Parent, there were 19 school days this year when the Parent had to drive to school to cover for the missing 1:1 nurse. As a corrective action for these days, the District must provide reimbursement for the Parent's round trip mileage at the District's privately-owned vehicle rate for those 19 days.

CORRECTIVE ACTIONS

By or before **February 15, 2023, June 1, 2023, September 1, 2023, November 1, 2023, and December 15, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **February 8, 2023**, the District and Parent will develop a schedule for 43 hours of compensatory education as follows:

- Speech Language: 3 hours
- Social/Emotional Skills: 20 hours
- Adaptive Skills: 20 hours

Unless otherwise agreed to by the District and Parent, services will be provided by a certified 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 Student's normal preschool day (e.g., during the afternoons when the Student attends preschool in the morning or Wednesdays when the Student does not currently attend preschool), on weekends, District breaks, or before or after school. The District will provide OSPI with documentation of the schedule for compensatory education by or before **February 15, 2023**.

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 **December 1, 2023**.

The District must provide OSPI with an update on the amount of compensatory services provided to the Student by providing documentation on **June 1, 2023**, **September 1, 2023**, and **November 1, 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 **December 15, 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 **December 15, 2023**.

Mileage Reimbursement

By or before **February 15, 2023**, the District will provide OSPI with documentation of reimbursement at the District's privately-owned vehicle rate for those 19 days when the Parent traveled to school to cover for the Student's 1:1 nurse.

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 5th day of January, 2023

Dr. Tania May
Assistant Superintendent of Special Education
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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.)