

## **SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-64**

### **PROCEDURAL HISTORY**

On April 27, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Peninsula 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 April 27, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on May 2, 2023. OSPI asked the District to respond to the allegations made in the complaint.

On May 19, 2023, 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.

On May 30, 2023, OSPI received the Parent's reply. OSPI forwarded that reply to the District the same day.

On June 13, 2023, OSPI requested that the Parent provide additional information, and the Parent provided the requested information on June 14, 2023. OSPI forwarded the information to the District the same day.

On June 13, 2023, OSPI requested that the District provide additional information, and the District provided the requested information on June 14, 2023. OSPI forwarded the information to the Parent on the same day.

OSPI considered all 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 April 28, 2022. 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. Did the District implement the nursing services to enable the Student to attend school from November 2022 to April 27, 2023 according to WAC 392-172A-03105?

### **LEGAL STANDARDS**

Definition of a Free Appropriate Public Education (FAPE): A "free appropriate public education" (FAPE) consists of instruction that is specifically designed to meet the needs of the child with a disability, along with whatever support services are necessary to permit the student to benefit

from that instruction. The instruction and support services must be provided at public expense and under public supervision. They must meet the State's educational standards, approximate the grade levels used in the State's regular education system, and comport with the child's individualized education program (IEP). *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 186-188, (1982). Every student eligible for special education between the ages of three and twenty-one has a right to receive a FAPE. 34 CFR §300.101; WAC 392-172A-02000. An eligible student receives a FAPE when the student receives, at public expense, an educational program that meets state educational standards, is provided in conformance with an IEP designed to meet the student's unique needs and includes whatever support services necessary for the student to benefit from that specially designed instruction. 34 CFR §300.17; WAC 392-172A-01080.

IEP Implementation: 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. It must also ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 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.

"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).

Reasonable Delays in Implementation: Reasonable delays in implementing an IEP while a school district conducts assessments and negotiates with parents are not material. *See J.S. v. Shoreline Sch. Dist.*, 220 F. Supp. 2d 1175, 1189 (W.D. Wash. 2002) (finding that implementation delay that occurred at "behest of the parents...was reasonable and was not...error"); *cf. Tracy N. v. Haw. Dep't of Educ.*, 715 F. Supp. 2d 1093, 1112 (D. Haw. 2010) (finding that delay in determining student's educational placement was reasonable because there were "ongoing discussions regarding placement in response to [the student's mother's] concerns, a reassessment of [the student's] cognitive and academic skills, and a reevaluation of [her] behavior").

Compensatory Education: A state educational agency is authorized to order compensatory education through the special education community complaint process. *Letter to Riffel* 34 IDELR 292 (OSEP 2000). Compensatory education is an equitable remedy that seeks to make up for education services a student should have received in the first place, and aims to place the student in the same position he or she would have been, but for the district's violations of the IDEA. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 56 IDELR 31, (9th Cir. 2011). There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994).

"There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time

than if the services were provided in a classroom setting." *In re: Mabton School District, 2018-SE-0036.*

## **FINDINGS OF FACT**

### **Complaint and District Response**

1. The Parent's complaint, filed on April 27, 2023, stated the Student "missed school, on all Thursdays and Fridays, in April, May, June, September, October and November 2022." Therefore, OSPI made an error in identifying the issue from November 2022 to April 27, 2023.
2. The District denied that it failed to materially implement the Student's nursing services from November 1, 2022 through April 27, 2023, and it was the District's position that, from November 1, 2022 through April 27, 2023, the Student only missed three days of school due to the absence of the contract nurse and no substitute nurse being available (November 3 and 4, 2022, and April 28, 2023).

However, the District also provided information in its response to the complaint, indicating that there were 16 school days when the Student was unable to attend school in the 2022–2023 school year because nurses were unavailable.

3. The District, in its response to the complaint, stated it appropriately implemented nursing services. However, the District also stated:

In the continued spirit of cooperation with Parent, the District will offer Student access to District instructional services this summer in order to make for missed instruction time caused by the nursing issue. The District is providing school-based Extended School Year (ESY) services this summer to qualifying students. Student does not qualify for ESY services through his IEP. But the District will work with Parent to schedule Student's participation in three agreed-upon dates between July 10–28, 2023, during which Student and a school-provided nurse can access the structured learning activities offered by the District.

### **Background: 2021–2022 School Year**

4. During the 2021–2022 school year, the Student attended preschool in the District and was eligible for special education services under the category of multiple disabilities. Due to his health conditions, the Student needed 24 hours a day of nursing care, including 1:1 nursing services, during school.
5. The preschool program was four days a week (Monday, Tuesday, Wednesday, and Thursday) from 1:30–3:30 pm daily.
6. On June 16, 2022, the Student's IEP team developed a new annual IEP for the Student for the 2022–2023 school year. The Student's June 16, 2022 IEP provided the Student with 1,740 minutes per week of schooling with 815 minutes of instruction per week in the special education setting. The IEP included annual goals in fine motor, communication, gross motor, adaptive behavior, social emotional/behavioral, and cognitive. The Student had an individual

health plan (IHP), which was disseminated to all staff that worked with the Student. Additionally, the Student's IEP included nursing services as a supplementary aid and service for 348 minutes/5 times weekly, which was to be provided throughout his entire school day in all school settings and on transportation. The IEP also called for the District to provide special education transportation.

The Student's June 16, 2022 IEP had a statement under "Present Levels of Performance-Adaptive" that stated the Student has been in a "preschool class since October 2021. He attended preschool three days per week instead of the full four days due to the unavailability of a 1:1 nurse for him on that fourth day."

7. There were seven Thursday preschool days between the time this investigation period started on April 28, 2022, and the end of the school year on June 15, 2022: April 28, May 5, 12, 19, 26, June 2, and 9, 2022.

### **2022–2023 School Year**

8. The District's 2022–2023 school year for kindergarteners began on September 6, 2022. The Student attended a District elementary school, and his June 16, 2022 IEP was in effect.
9. The bell schedule for academic instruction at the Student's elementary school was 8:50 am to 3:30 pm on Monday, Tuesdays, Thursdays, and Fridays, and from 9:50 am to 3:30 pm on Wednesdays.
10. The District did not have any nurse available to provide the nursing services called for in the Student's IEP on Thursdays and Fridays from the time the Student started school until November 7, 2022.
11. Based on emails between the Parent and District and attendance information from the District, because the Student had extensive surgery in late summer, the Student initially began attending school on September 19, 2022, for approximately four hours per day until he gained enough stamina to attend full days.
12. Beginning on September 19, 2022, at District expense, the Student's home health nurse attended school with the Student to provide the nursing services called for in the Student's IEP on Mondays, Tuesdays, and Wednesdays. In late September, the Student attend the following days:
  - On September 19 and 20, the Student attended school from 9 am–1 pm, and on September 21, 2022, the Student attended school from 10 am–1 pm.
  - On September 26, 27, October 3, and 4, 2022, the Student attended school from 9 am–2 pm, and on September 28 and October 5, 2022, the Student attended school from 10 am–2 pm.
13. In additional information from the Parent, the Parent stated that because the Student was still learning to use a new wheelchair, had emergency equipment, and had the home health nurse that needed to accompany him, the Parent initially provided transportation to and from school for the Student's safety between September 19 and October 5, 2022.

14. According to additional information provided by the Parent, the District had a contract with that home health nurse's agency, and that nurse was willing and able to accompany the Student to school Monday through Wednesday. The District paid that agency for the nurse's services when that nurse provided services to the Student at school.
15. The District did not have a contract nurse with any agency for the Student's nursing services on Thursdays and Fridays between September 19 and October 10, 2022, while the Student attended partial school days. During that time, the Student missed out on approximately four hours of instruction<sup>1</sup> on six school days: September 22, 23, 28, 29, October 6, and 7, 2022.
16. The Student began attending school for full days on October 10, 2022, and the District began providing transportation for the Student on that date.
17. On Monday, October 17, 2022, the Student's nurse was absent, and the Student was unable to attend school. Additionally, the District provided information in its response to the complaint, indicating the Student was unable to attend school on the following Thursdays and Fridays in October 2022, because nurses were unavailable: October 13, 14, 20, 21, 27, and 28, 2022.
18. On November 1, 2022, the District's director of special education notified the Parent that a new, contract nurse had been secured for Thursdays and Fridays.
19. On November 2 and 4, 2023, the District provided information in its response to the complaint, indicating the Student was unable to attend school because a nurse was unavailable.
20. On November 7, 2023, the new nurse shadowed the Student's other nurse, and began working with the Student at District expense on Thursdays and Fridays on November 10, 2022.

After that, the Student regularly attended school and took District provided transportation with his nurses accompanying him or provided by the District Monday through Friday, except when he had medical appointments or health-related absences.

21. After November 10, 2022, there were three school days when the Student was unable to attend school because no substitute nurses were available Monday, November 21, the nurse was absent; Thursday, December 1, 2022, was a two-hour late start and no nurses were available; and Friday, April 28, 2023, the nurse was absent.

## **CONCLUSIONS**

**Issue: Implementation of Nurse Services** – The Parent alleged that the Student missed school in the 2021–2022 and 2022–2023 school years due to the District not having nurses available to provide the Student's nursing support services.

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<sup>1</sup> The regular full school day was six hours and forty minutes (Monday, Tuesday, Thursday, and Friday) and five hours and forty minutes on Wednesday, including lunch and recess.

A free appropriate public education (FAPE) consists of instruction that is specifically designed to meet the needs of the child with a disability, along with whatever support services are necessary to permit the student to benefit from that instruction. Special education services are reflected in an IEP and a district must ensure services are implemented consistent with the IEP.

Here, the Student's IEP developed on June 16, 2022 indicated that the Student would attend full days, needed a nurse with him all day and throughout his school day, including on transportation, and would receive District provided special education transportation.

During the 2021–2022 school year when the Student attended preschool, the District did not have a nurse available for the Student on Thursdays. As a result, and as documented in the Student's June 2022 IEP, the Student could not attend preschool for two hours per day on seven school days that fall within the timeframe of this complaint (April 28, 2022 and the end of the school year on June 15, 2022).

Because the Student had extensive surgery in late summer, the Parent notified the District that the Student would not attend school until September 19, 2022. When he started attending in late-September, the Parent requested that he attend partial days to regain his stamina. Additionally, the Parent initially transported the Student to facilitate the partial day schedule and to allow the Student to acclimate to use of his new wheelchair between September 19 and October 5, 2022.

OSPI has determined that allowing the Student to attend partial school days and having the Parent transport the Student between September 19 and October 5, 2022 was at the Parent's request and was based on the Student's disability related needs and impacted stamina and was reasonable. Accordingly, OSPI does not find that those deviations from the Student's IEP constituted a denial of FAPE during that period.

However, during the 2022–2023 school year, the Student's kindergarten year, the District did not have a nurse available for the Student on Thursdays and Fridays until November 7, 2022. As a result, the Student was not able to attend school from 9 am–1 pm (four hours per day) for two school days: September 19 and 23, 2022. The Student was also not able to attend school from 9 am–2 pm (five hours per day) on four school days: September 28, 29, October 6, and 7, 2022. Finally, on October 10, 2022, the Student returned to school full time, but could not attend school from 8:50 am–3:30 pm (six hours and forty minutes) on eight additional school days: October 13, 14, 20, 21, 27, 28, November 3, and 4, 2022.

Additionally, the District did not have a nurse available when the Student's Monday through Wednesday contract nurses were absent, so the Student missed an additional three full school days: October 17, November 21, 2022, and April 28, 2023. The Student was also not able to attend school on one other school day, December 1, 2022, which was a two-hour late start day due to snow because no nurses were available.

Because the District did not have nurses available to serve the Student as required by his IEP, OSPI determined the Student was denied FAPE when he was unable to attend school on 25 full and partial school days between April 28, 2022 and April 28, 2023. OSPI finds a violation.

The District will be required to develop a plan to ensure the Student is provided nursing services during the 2023–2024 school year and have a plan in place for how the Student will participate in school in the event the nurse is absent. The District will also provide the Student compensatory education to make up for the lost instruction on days the Student missed school due to the lack of a nurse. Compensatory education is an equitable remedy and seeks to put a student in the place they would have been but for the violation. There is no requirement to provide minute for minute compensatory education and generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting. Thus, here, OSPI finds it equitable, given that the 25 days missed were a mix of full and partial days and that the District offered services during ESY, to provide the Student with 10 days of services during ESY as compensatory education.

### **CORRECTIVE ACTIONS**

By or before **June 30, 2023, August 4, 2023, and September 1, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

#### **STUDENT SPECIFIC:**

##### **Compensatory Education During ESY Programming**

By or before **June 30, 2023**, the District and Parent will communicate regarding which 10 days of instruction the Student will participate in during the District’s ESY programming, between July 10 and 28, 2023.

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher or related service provider, with support from the Student’s nurse. Services may be provided in a 1:1 setting or a group setting, if appropriate. The District will provide OSPI with documentation of the schedule for services by or before **June 30, 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 **July 30, 2023**.

By or before **August 4, 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 **August 4, 2023**.

### **Plan for 2023–2024 School Year Nursing Services**

The District will develop a plan to ensure the Student is provided nursing services during the 2023–2024 school year and have a plan in place for how the Student will participate in school in the event the nurse is absent.

By or before **September 1, 2023**, the District will provide information and documentation to OSPI that it has secured nursing services and substitute nursing services for the Student to ensure there are services in place to ensure the Student receives FAPE for the 2023–2024 school year. OSPI will provide feedback and further documentation deadlines as necessary.

### **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 23rd day of June, 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.)