

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 23-193

PROCEDURAL HISTORY

On December 31, 2023, the Office of Superintendent of Public Instruction (OSPI) received and opened a Special Education Community Complaint regarding a student (Student) attending the [REDACTED] School District (District). The complainant (Complainant) is the Student's 1:1 paraeducator and alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On December 31, 2023, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on January 3, 2024. OSPI asked the District to respond to the allegations made in the complaint.

On January 19, 2024, OSPI received the District's response to the complaint and forwarded a redacted copy to the Complainant on the same day. OSPI invited the Complainant to reply.

On January 26, 2024, OSPI requested additional information from the District and that information was provided the same day.

On January 30, 2024, the Parent sent OSPI a signed release form, allowing the Complainant access to the Student's school records. OSPI forwarded an unredacted copy of the District's response to the Complainant on January 31, 2024.

On February 8, 2024, OSPI received the Complainant's reply to the District's response. OSPI forwarded the reply to the District on February 9, 2024.

OSPI considered all information provided by the Complainant 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 January 1, 2023. 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. Since January 1, 2023, per WACs 392-172A-03110 and 392-172A-03100/05001, has the District amended the Student's individualized educational program (IEP) for nursing services inappropriately by not holding IEP team meetings when required and not seeking input from the Parent?
2. Since January 1, 2023, per WAC 392-172A-03105, has the Student's IEP been implemented properly, including the Student's 1:1 nursing services and health plan?

LEGAL STANDARDS

IEP Amendments: After the annual individualized education program (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. And, generally, the district must give the parent a copy of the student's IEP at no cost to the parent. WAC 392-172A-03100.

IEP Team Unable to Reach Consensus: The IEP team should work toward consensus, but the district has ultimate responsibility to ensure that the IEP includes the services that the student needs in order to receive FAPE. No one team member has "veto power" over individual IEP provisions or the right to dictate a particular educational program. If the team cannot reach consensus, the district must provide the parents with prior written notice of the district's proposals or refusals, or both, regarding the student's educational program and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12, 472, 12,473 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 9). *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). *See also, Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182-83 (9th Cir. 1984) (Holding that a school district is responsible for providing a student with a disability an education it considers appropriate, even if the educational program is different from a program sought by the parents.)

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. A school district must develop a student's IEP in compliance with the procedural requirements of the IDEA and state regulations. 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 [student with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

FINDINGS OF FACT

Background

1. On March 29, 2022, the Student's IEP team met. The Student was eligible for special education services under the multiple disabilities category. The Student's IEP included specially designed instruction (SDI) provided by the special education staff, from March 31, 2022 until March 30, 2023, in a special education setting, as follows:
 - Adaptive: 800 minutes/weekly
 - Social Emotional: 800 minutes/weekly

The IEP included the following related services:

- Vision: 20 minutes/weekly (provided by a vision specialist)
- Communication: 90 minutes/monthly (provided by a speech language pathologist (SLP))

The Student received 1,885 minutes per week of building instructional time, with 1,642.5 minutes per week served in the special education setting. The percent of time in a general education setting was 12.86%. The Student's LRE was LRE 0–39%.

The IEP also included the following supplementary aids and services:

- Motor: 300 minutes/yearly (provided by an occupational therapist (OT)/physical therapist (PT))
- 1:1 Paraeducator Support/Health Related: 1,643/weekly (in special education)
- 1:1 Paraeducator Support/Health Related: 457/weekly (in general education)
- Nursing: 1,643/weekly (in special education)
- Nursing: 457/weekly (in general education)

2. On August 24, 2022, nurse 1 was hired to be the Student's 1:1 nurse. Nurse 1's duties included, but were not limited to, administering a gastrostomy tube, a catheter, an ostomy bag, and medication.
3. On September 1, 2022, the District held its first day of instruction for the 2022–23 school year. The Student was attending a District high school and the Student's March 29, 2022 IEP was in effect.
4. On November 7, 2022, the Complainant "started a google document recording data regarding the student's personal care/nursing experience. i.e., nurse's tardiness, the amount of time it took the nurse to perform/prepare duties, student's time in and out of the classroom, reminders to give to...[nurse 1]".¹
5. The Student's personal care notes provided, in part:
 - At least seventeen references to nurse 1 being late for work.

¹ The complaint included two sets of notes drafted by the Complainant. One set of notes will be referred to as "Complainant's notes". These notes are from August 24, 2022–September 15, 2023, and include about 23 entries. Another set of notes will be referred to as "Student's personal care notes". In the complaint, these notes included about 40 entries and were provided from November 7, 2022–June 9, 2023.

- Student's medication and meals not prepared on time, and not prepared ahead of time so that the Student loses as little time as possible with her classmates. Student sometimes lost as much as thirty minutes because of nurse 1's lack of preparation.
- Traveling the hallways during passing periods which results in other students bumping into the Student's wheelchair.
- Nurse 1 making comments that about the Student's physical appearance and the appearance of other students that the Complainant believed were inappropriate.
- "Has been reminded to ensure [Student's] dignity and privacy by moving her away from classmates and teachers when getting a flush (lifting her shirt, cleaning the feeding tube, etc) pretty often."
- Engaging in her responsibilities to the Student in unsanitary ways such as spilling feces and urine, and not changing her gloves after assisting the Student with toileting.
- Failing to follow the proper procedures for getting the Student in the Hoyer lift.
- Inappropriately sharing Student's medical information with other school employees.
- Including inappropriate comments about other students' behavior in the Student's medical binder.
- Leaving the Student unattended.
- Failure to secure medication and equipment from other students.
- Not properly caring and cleaning the Student's medical equipment.
- Struggling to remember details to record accurately in medical binder.

6. On November 14, 2022, the Complainant's notes provided:

[Nurse 1] met with me after I expressed my concerns to the student's [case manager 1] verbally. [Nurse 1] agreed to be more timely with personal care/medication prep to maximize student's time in the classroom. This was a quick verbal, in person discussion. She told me if I have any other concerns to speak to her directly. I said I just had general concerns and [case manager] is my supervisor who wanted to check in with me and [Student's] new schedule, so I expressed my concerns and [Student's] personal care schedule.

Complaint Investigation Timeline Began January 1, 2023

7. On January 24, 2023, the Complainant's notes provided, "[assistant principal] emails [case manager 1] that she spoke with [district health supervisor], [nurse 1's] direct supervisor, about our concerns. [Case manager 1] shared this email/news with me to see our concerns were being heard."

8. On March 8, 2023, the Complainant's notes provided:

I met with [case manager 1] and paraeducator...to discuss continued nursing concerns we have all witnessed....Our shared concerns were:

Retaining procedures/poor memory

- If bathroom procedures aren't consistently remembered, then we are concerned about med administration that nurse does independently. Meds must be correctly administered with no mistakes!!!. We will keep a better eye out going forward after shared concerns.

...

- Meds/feed procedures continue to be slow, effecting [Student's] time in class time.
- Safety and awareness of [Student's] body continues to be reminded.

- Confidentiality and dignity is not consistent.
- Inappropriate comments.

We all agreed [Student] deserves a more competent nurse. We did not feel safe leaving [Student] alone with the nurse. We as the FSA team, [Student's] care team, would rather perform these medical duties ourselves to maintain [Student's] dignity and safety because the nurse couldn't do it. [Case manager 1] said she would ask [assistant principal] if that would be possible while the school looked for a better nurse.

9. On March 9, 2023, the Complainant's notes provided, "[Case manager 1] met with [assistant principal] in person to share our concerns."
10. On March 17, 2023, the Student's IEP team met. The Student's IEP included specially designed instruction (SDI) provided by the special education staff, from March 29, 2023 until March 28, 2024, and in a special education setting, as follows:
 - Adaptive: 800 minutes/weekly
 - Social Emotional: 800 minutes/weekly

The IEP included the following related services:

- Vision: 20 minutes/weekly (provided by a vision specialist)
- Communication: 90 minutes/monthly (provided by SLP staff)

The Student received 1,885 minutes per week of building instructional time, with 1,642.5 minutes per week served in the special education setting. The percent of time in a general education setting was 12.86%. The Student's LRE was LRE 0–39%.

The IEP also included the following supplementary aids and services:

- Motor: 120 minutes/yearly (provided by an OT/PT)
- 1:1 Paraeducator Support/Health Related: 1,643/weekly (in special education)
- 1:1 Paraeducator Support/Health Related: 457/weekly (in general education)
- Nursing: 1,643/weekly (in special education)
- Nursing: 457/weekly (in general education)

11. On April 27, 2023, the Complainant's notes provided, "I still had concerns about [Student's] nursing/personal care so I went to my supervisor [case manager 1]...The school nurse was also concerned about [nurse 1]. She said a full team meeting with [district health supervisor] would be the best next step."
12. On May 1, 2023, the Complainant's notes provided, "district health supervisor came into to observe [nurse 1]."
13. On May 8, 2023, nurse 1 resigned their position at the District.
14. On May 11, 2023, nurse 2 was hired to be the Student's 1:1 nurse.
15. In June 2023, nurse 2 informed the District that she would not be returning.

16. On June 20, 2023, the Complainant's notes provided that assistant principal informed case manager 1 that there will be no new nurse next year and to amend the Student's IEP.
17. The District provided detailed records for the 2022–23 school year related to when the Student's gastrostomy tube, ostomy bag, catheter, and medication were administered.

Summer 2023

18. On August 31, 2023, the Complainant's notes provided that case manager 2 was asked to amend the Student's IEP without meeting the Student or meeting with the IEP team.
19. On August 31, 2023, the assistant principal emailed case manager 2 as follows:

At this time, please amend the IEP to remove the nursing support language as she does not have a continuous need for a 1:1 nurse according to [district health supervisor].

...

Now, at this time, [Complainant] has been hired to work with [Student]. Given the IEP amendment, to [district health supervisor] shared with me that she cannot staff a nurse at this time and that cath and feeding tube care would have to be taken on by [school nurses]???
20. On September 1, 2023, case manger 2 sent the following internal District email, "I spoke to mom this morning and she gave consent to make the amendment without holding a meeting."²

2023–23 School Year

21. On September 6, 2023, the District held its first day of instruction for the 2023–24 school year. The Student's March 17, 2023 IEP was in effect and the Student was attending a District high school. At this time, a 1:1 nurse had not been hired for the Student.
22. On September 6, 2023, the Complainant's notes provided that case manager 2 "was asked to hold on amending the IEP, after already typing up the amendment but it was eventually deleted."
23. On September 7, 2023, the assistant principal emailed the District health supervisor as follows:

At this time, we cannot require [Complainant] to take on the healthcare responsibilities for student...I will be meeting with the...teacher, our nurses and [Complainant] to review the care requirements to check in, again, with [Complainant] to see if she would be willing and comfortable with providing this care to [Student].

After our meeting, I would love for us to connect on next steps regarding the care that [the Student's] needs in the classroom. I will then follow up with mom with our plan.
24. On September 8, 2023, the assistant principal sent an internal email that stated as follows,

² This assertion was also supported by the case manager's handwritten notes.

It was shared that the minutes of care provided to the student by our [school] nurses was approximately 155 minutes in total. This included walking to and from the classroom, providing care needed, as well as any cleaning needed to support the level of care provided.

At this time, [Complainant] is unsure whether or not she is comfortable with providing this level of care to the student.

I have also spoken to the student's mother on the phone who has shared that she would feel more comfortable with a nurse caring for her daughter. She understands that [Complainant] or a paraeducator could provide the care needed, however, she is worried that a paraeducator may need support when fulfilling the duties...

I also wanted to share that it was shared with mom that if our...[school] nurses were not on campus for any reason and if the para was absent from school as well, the student could not come to school as no one would be available to provide the care needs for her daughter. Mom shared that this is a secondary reason why a 1:1 nurse is needed.

Given the information provided, what will be our next steps for this student?

25. On September 11, 2023, the assistant principal emailed case manager 2, "please call mom to let her know that we will have a nurse (nurse 3) for [Student] as soon as they are onboarded."

26. On September 15, 2023, nurse 3 began work. The Complainant's notes provided, "...[Student] gets a 1:1 nurse!!!! And she's been hygienic, prompt, and friendly, and maintains [Student's] dignity as a high school teenager."

27. On December 31, 2023, the Complainant filed a complaint that alleged, in part:

- The District "inappropriately made IEP decisions based upon a majority 'vote' and dictated removing required IEP nursing services WITHOUT parent consent/knowledge and the adequate input from parents, teacher/case manager, health providers and paraeducator."
- The District did "not adequately providing my 1:1 student's 1:1 nursing services as required by the student's IEP so that the student could be hygienically and physically safe, and attend classes on time."

28. On January 19, 2024, the District submitted its response. Regarding the first issue, amending an IEP, the District responded, in part:

The District denies that it inappropriately amended Student's IEP for nursing services by not holding an IEP meeting when required and not seeking input from Parent.

...

In this case, the District appropriately sought input from Parent, because [case manager 2] contacted Student's Parent via telephone on September 1, 2023, and discussed amending Student's IEP to remove nursing minutes...Student's Parent gave [case manager 2] permission to proceed with amending the IEP without holding an IEP meeting...However, Student's IEP was ultimately not amended, even after obtaining Parent's authorization.

Regarding the second issue, implementing the Student's IEP, the District responded, in part:

The District denies that it failed to materially implement Student's IEP, including Student's 1:1 nursing services and health plan since January 1, 2023.

...

Here, the District states that its implementation of Student's IEP since January 1, 2023 did not rise to a material failure to implement Student's IEP where it provided Student a 1:1 Nurse with only a three-day gap between May 8, 2023 and May 11, 2023, when the 1:1 Nurse quit without notice...

Further, the first day of the 2023-24 school year was September 6, 2023, and a 1:1 Nurse was hired as of September 15, 2023, with only seven school days where Student did not have a 1:1 Nurse at the start of the 2023-24 school year. Significantly, District building nurses stepped in during the seven-day gap at the beginning of the 2023-24 school year to provide Student with nursing care.

...the majority of those 10 days were covered by building nurses, the District's position is that the absence of a 1:1 nurse was no more than a minor discrepancy between the provided services and Student's IEP.

29. On February 8, 2024, OSPI received the Complainant's reply to the District's response. The reply stated, in part:

I was initially willing to take over catheterization when I witnessed the struggles of the incompetent nurse, who failed to perform it correctly multiple times a day, before and after the student's surgery. I offered to do it temporarily while they searched for a new nurse because what I was witnessing was unacceptable. Witnessing [Student] flinch and cry during her personal care with this nurse remains etched in my mind. I never felt safe leaving the nurse alone to administer [Student's] medications due to her inability to remember numbers correctly. Initially, I was told I couldn't take on these roles, then suddenly, I was allowed. The inconsistency and lack of clarity regarding nursing services from admin/health supervisor made me uncomfortable.

I was uncomfortable because the administration seemed inclined towards a solution that involved removing nursing services altogether and assigning me additional responsibilities, rather than upholding [Student's] legal entitlement to a 1:1 nurse. This approach neglected [Student's] rights and overlooked the significant impact of having a dedicated nurse on her education. It's become evident that having a dedicated nurse has maximized [Student's] class time. This year, she has consistently been on time to all her classes, doesn't flinch or cry, and is consistently happy when she is alone with her new nurse.

The introduction of a new qualified nurse has facilitated seamless collaboration between us, allowing us to integrate [Student's] personal care schedule effortlessly to optimize her classroom experience. In contrast to the previous situation, where [Students] often had to wait for her former nurse to fulfill only the basic requirements, the current setup ensures that her needs are promptly met, allowing her to fully engage in her educational activities. This has allowed the...classroom to run more smoothly and safely too. I no longer have to pull another paraeducator to help support me and the former nurse. Now [Student's] classmates get their entitled support and class time too. It's unfortunate it took this long for [Student] to finally be paired with a competent nurse but it's all thanks to the people I mentioned previously and my courage to speak up when I saw something was not right.

Moving forward, I implore the district to carefully assess the wider implications of its decisions on [Student's] well-being. It's crucial to prioritize transparent communication and collaboration with educators who spend the most time with her. Additionally, the district

should improve its efficiency in screening and hiring 1:1 nurses to ensure that students like [Student] receive the support they deserve. What I witnessed with the former nurse should never happen again, to any student.

CONCLUSIONS

Issue 1: IEP Amendments – Regarding the first issue, amending the Student’s IEP for nursing services inappropriately, the Complainant has alleged that the District “inappropriately made IEP decisions based upon a majority ‘vote’ and dictated removing required IEP nursing services WITHOUT parent consent/knowledge and the adequate input from parents, teacher/case manager, health providers and paraeducator.” (Emphasis in original.) The District responded, “the District appropriately sought input from Parent, because [case manager 2] contacted Student’s Parent via telephone on September 1, 2023, and discussed amending Student’s IEP to remove nursing minutes.”

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.

The present case record shows that the District obtained the Parent’s consent to amend the Student’s IEP to remove nursing services on September 1, 2023. Additionally, despite the Parent’s consent, the District did not amend the Student’s IEP and the record shows that on September 11, 2023, the assistant principal informed case manager 2 that a 1:1 nurse had been hired for the Student in compliance with the Student’s March 2023 IEP. Thus, the facts show that the District did not inappropriately amend the Student’s March 2023 IEP to remove 1:1 nursing services, and for this reason, OSPI does not find a violation regarding the first issue.

Issue 2: IEP Implementation – Regarding the second issue, the Complainant alleged that the District did not adequately provide the Student her “1:1 nursing services as required by the student’s IEP so that the student could be hygienically and physically safe, and attend classes on time.” The District responded:

Here, the District states that its implementation of Student’s IEP since January 1, 2023 did not rise to a material failure to implement Student’s IEP where it provided Student a 1:1 Nurse with only a three-day gap between May 8, 2023 and May 11, 2023, when the 1:1 Nurse quit without notice, and a seven-day gap at the beginning of the 2023-24 school year.

Further, the first day of the 2023-24 school year was September 6, 2023, and a 1:1 Nurse was hired as of September 15, 2023, with only seven school days where Student did not have a 1:1 Nurse at the start of the 2023-24 school year. Significantly, District building nurses stepped in during the seven-day gap at the beginning of the 2023-24 school year to provide Student with nursing care.

...the majority of those 10 days were covered by building nurses, the District’s position is that the absence of a 1:1 nurse was no more than a minor discrepancy between the provided services and Student’s IEP.

A school district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 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.

The Complainant's notes show that she, case manager 1, and a school nurse had concerns with how nurse 1 was performing her duty. Despite these concerns, the present case's records show that nurse 1 was meeting the Student's medical needs on a daily basis. Even accepting that nurse 1 was not fulfilling her responsibilities correctly at times,³ this alone does not establish that the District materially failed to satisfy the Student's nursing needs as called for in the Student's IEP.

Additionally, when nurse 1 quit her position on May 8, 2023, the District hired nurse 2 to be the Student's 1:1 nurse immediately and nurse 2 began on May 11, 2023. Then when nurse 2 did not return for the 2023–24 school year, the present case's record shows that the Student began the school year on September 6, 2023, without a 1:1 nurse. Despite that, between September 6 and September 15, 2023, when the Student's new 1:1 nurse (nurse 3) began, the school building's nurses were attending to the Student's medical needs for approximately 150 minutes per day. Based on these facts, the District did not materially fail to provide the Student's 1:1 nursing needs, even when the Student did not have a person appointed as her 1:1 nurse. Thus, for the reasons provided above, OSPI does not find a violation as to the second issue.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

Dated this 27th day of February, 2024

Dr. Tania May
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³ For example, the Complainant alleged that because nurse 1 was not carrying out her duties appropriately, the Student was missing class time. While this is unfortunate, a review of the Student's progress reports show that she was still making progress on her goals.

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.)