

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 21-92

PROCEDURAL HISTORY

On November 5, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from an attorney (Complainant) representing the parents (Parents) of a student (Student) attending the Seattle School District (District). The Complainant 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 8, 2021, 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 November 24, 2021, OSPI received the District's response to the complaint and forwarded it to the Complainant on November 29, 2021. OSPI invited the Complainant to reply.

On December 13, 2021, OSPI received the Complainant's reply. OSPI forwarded that reply to the District on the same day.

On December 15, 2021, OSPI contacted the District for additional information. The District did not respond.

On December 20, 2021, OSPI contacted the Complainant for additional information and spoke with the Complainant.

On December 21, 2021, OSPI contacted the District for additional information. The District did not respond.

OSPI considered all of the 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 November 6, 2020. 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 implement the Student's individualized education program (IEP) during the 2020–2021 school year, beginning November 6, 2020, including extended school year (ESY) services and (as appropriate) recovery services?
2. Did the District follow procedures for reporting progress to the Parents?

3. Did the District follow IEP meeting procedures in response to the Parent's request for a meeting to discuss the Student's need for in-person services?
4. Did the District follow procedures for the December 17, 2020 IEP meeting, including:
 - a. Following IEP meeting notice procedures?
 - b. Developing an IEP that was tailored to the Student's unique needs?
 - c. Following procedures for prior written notice (PWN)?
5. Did the District appropriately consider the Student's need for recovery services related to the COVID-19 pandemic?

LEGAL STANDARDS

IEP Implementation: A district must ensure it provides all services in a student's individualized education program (IEP), consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105.

Progress Reporting: The purpose of progress reporting is to ensure that, through whatever method chosen by a school district, the reporting provides sufficient information to enable parents to be informed of their child's progress toward the annual IEP goals and the extent to which that progress is sufficient to enable the child to achieve those goals. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir, 2001) (parents must be able to examine records and information about their child in order to "guarantee [their] ability to make informed decisions" and participate in the IEP process). IEPs must include a statement indicating how the student's progress toward the annual goals will be measured and when the district will provide periodic reports to the parents on the student's progress toward meeting those annual goals, such as through the use of quarterly or other periodic reports concurrent with the issuance of report cards. 34 CFR §300.320(a)(3); WAC 392-172A-03090(1)(c).

Parent Request for IEP Meeting: When a parent or district believes that a required component of a student's IEP should be changed and requests an IEP meeting, the district must conduct an IEP meeting if it believes that the change may be necessary to ensure the provision of FAPE. Individuals with Disabilities Education Act (IDEA), 64 Fed. Reg. 12,475, 12,476 (March 12, 1999) (Appendix A to 34 CFR Part 300, Question 20). The District must schedule the meeting at a mutually agreeable time and place, and appropriately invite the parent to the meeting. 34 CFR §§300.322 and 300.328; WAC 392-172A-03100. If a parent requests an IEP meeting because the parent believes that a change is needed in the provision of FAPE to the student or the educational placement of the student, and the school district refuses to convene an IEP meeting because no change is necessary for the provision of a free appropriate public education (FAPE), the district must provide written notice to the parents of the refusal, including an explanation of why the district has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student. IDEA (Appendix A to 34 CFR Part 300, Question 20).

IEP Revision: A student's IEP must be reviewed and revised periodically, but not less than annually, to address: any lack of expected progress toward annual goals or in the general education curriculum; the results of any reevaluations; information about the student provided to, or by, the

parents; the student's anticipated needs; or any other matters. 34 CFR §300.324(b); WAC 392-172A-03110(3).

Invitations to Meetings: The IEP invitation should include the purpose, time, and location of the meeting; indicate who will be in attendance; and inform the parents of the provisions relating to participation by other individuals on the IEP team who have knowledge or special expertise about the student. 34 CFR §300.322; WAC 392-172A-03100(3).

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.

Prior Written Notice: Prior written notice ensures that the parent is aware of the decisions a district has made regarding evaluation and other matters affecting placement or implementation of the IEP. It documents that full consideration has been given to input provided regarding the student's educational needs, and it clarifies that a decision has been made. The prior written notice should document any disagreement with the parent, and should clearly describe what the district proposes or refuses to initiate. It also includes a statement that the parent has procedural safeguards so that if they wish to do so, they can follow procedures to resolve the conflict. Prior written notice is not an invitation to a meeting. Prior written notice must be given to the parent within a reasonable time before the district initiates or refuses to initiate a proposed change to the student's identification, evaluation, educational placement or the provision of a free appropriate public education. It must explain why the district proposes or refuses to take action. It must describe any other options the district considered, and it must explain its reasons for rejecting those options. 34 CFR 300.503; WAC 392-172A-05010.

Recovery Services: Recovery services are intended to mitigate the impact of COVID-19 school facility closures and to enable the student to make progress on IEP goals, used if students have not been provided or were unable to access IEP services during the COVID-19 pandemic. While the need for recovery services may not be able to be fully measured until in-person school operations resume, districts were not prohibited from providing recovery services during the 2020-2021 school year and recovery services should be determined by IEP teams on a case-by-case basis. Districts should examine the effect of COVID-19 and the special education and related services provided during school building closures and during the 2020-2021 school year on the student's overall progress and engagement, including progress toward their IEP goals. *Questions and Answers: Provision of Services to Students with Disabilities During COVID-19 in Fall 2020* (OSPI, August 26, 2020).

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). The award of compensatory education is a form of equitable relief and the IDEA does not require services to be awarded directly to the student. *Park ex rel. Park v. Anaheim Union School District*, 464 F.3d 1025, 46 IDELR 151 (9th Cir. 2006).

Appropriate relief in the form of compensatory education is “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). Compensatory education is not an appropriate remedy for a purely procedural violation of the IDEA. *Maine School Administrative District No. 35 v. Mr. and Mrs. R. ex rel. S.R.*, 321 F.3d 9, 38 IDELR 151 (1st Cir. 2003).

FINDINGS OF FACT

Background: 2019–2020 School Year

1. During the 2019–2020 school year, the Student attended a District elementary school and was eligible to receive special education services under the category of multiple disabilities.
2. In March 2020, the District closed school buildings due to the COVID-19 pandemic and the District began to provide remote instruction to all students in the District.
3. On May 5, 2020, the District conducted an individualized education program (IEP) meeting for the Student with the Parent in attendance. The “Team Considerations” in the IEP were as follows:
 - Communication: Eligible to receive specially designed instruction in communication
 - Assistive Technology and Service: Had access to speech-generating device
 - Behavior: Hit her head when frustrated and pushes desk against next desk in front
 - Vision: Wears glasses and received vision services.

The Student’s IEP provided annual goals in the areas of adaptive physical education (using scooter board, throwing a ball, eating, and putting on coat), communication (turn taking and using speech generating device to make utterances), functional math (counting objects to 10 and recognizing pattern), functional reading (identifying letters and words), written language (tracing shapes and pinching a clothes pin), motor (walking using gait trainer and transfers without falls), functional language, and social/behavior (getting a peer’s attention and using a speech generating device to say “no,”). (See also, Appendix A)

The IEP also provided for 13 accommodations that included visual daily schedule, hands-on assignments, and a speech-generating device. The service matrix provided the following services—related services and specially designed instruction—all in a special education setting, from May 8, 2020 to May 7, 2021:

- Occupational therapy (related service): 30 minutes monthly (provided by an occupational therapist (OT))
- Physical therapy (related service): 60 minutes weekly (provided by a physical therapist (PT))
- Motor: 20 minutes monthly (provided by a PT)

- Adapted physical education: 30 minutes/once a week (provided by a general education teacher)
- Communication: 120 minutes monthly (provided by a speech/language pathologist (SLP))
- Adapted life skills: 60 minutes/5 times weekly (provided by special education staff)
- Math: 45 minutes/5 times weekly (provided by special education staff)
- Reading: 45 minutes/5 times weekly (provided by special education staff)
- Social/Behavior: 60 minutes/5 times weekly (provided by special education staff)
- Written language: 45 minutes/5 times weekly (provided by special education staff)

The IEP also provided the following supplemental aids and services:

- Vision services consultation: 180 minutes yearly (provided by vision teacher)
- Occupational therapy: 15 minutes monthly (provided by an instructional assistant (IA))
- Adapted physical education consultation: 30 minutes/2 times yearly (provided by adapted physical education teacher).

The IEP noted the Student would spend 1,775 minutes per week in school, 1,407.5 minutes in the special education setting, and the remaining 20.7% of her time in the general education setting. The IEP did not provide extended school year (ESY) services to the Student.

4. The prior written notice, dated May 5, 2020, stated the Parent requested more general education time for the Student. The notice stated: "Team agreed for social purposes, plan is being built to accommodate."
5. The June 2020 progress report listed the Student's progress towards the annual goals as "not applicable" due to not being able to collect data. (See Appendix A.)¹

2020–2021 School Year

6. During the 2020–2021 school year, the Student continued to attend an elementary school in the District and continued to be eligible to receive special education services.
7. Beginning in August 2020 (and continuing through the fall until December 2020), the Parent exchanged numerous emails with District staff regarding the Parent's request for an IEP meeting to discuss having the Student receive in-person services due to the Student's lack of progress during remote instruction. According to the complaint, the delay in scheduling and holding an IEP meeting was in part due to the District not yet determining when all students could receive in-person instruction based on health and safety factors. The District's response stated the delays were due in part to the Parent's insistence on having all IEP team members present rather than excusing some members.
8. On September 4, 2020, the 2020–2021 school year began in the District.
9. On September 14, 2020, full-time/full-school day, remote instruction began for all students in the District.

¹ SECC #21-31 addressed the systemic issue regarding the District failing to conduct progress monitoring during COVID and providing sufficient progress reports to Parents.

According to the District, the District initially provided two hours a day of remote instruction to all students (between September 4 and 14, 2020), including the Student.

10. In September 2020, according to the District, the Student's May 2020 IEP goals were "adjusted to the remote setting" as follows:

Continue to take data on

- Adaptive/Life skills (Using fingers or utensils)
- Math (Counting with 1:1 correspondence)
- Math (Recognizing ABABAB pattern)
- Reading (Identifying letters)
- Reading (Identifying sight words)
- Written Language (Tracing shapes)
- Written Language (Pinching clothes pin)
- Social/Behavior (Saying "no")

Change to make more virtual

- Adapted PE (scooter board movement)
- Adapted PE (throwing ball or bag)

Table for now/at home

- Adaptive/Life skills (remove coat)
- Social/Behavior (play independently)
- Social/Behavior (peer attention)

11. On October 9, 2020, according to the prior written notice dated October 5, 2020, the Student's teacher and Parent met to review the Student's IEP services and schedule for remote learning and "discussed in person services." The Parent was concerned that the Student "is not able to access the education remote setting." The notice stated the full IEP team would meet "when enough data is taken to show whether in person services will be required." In addition, the notice stated: "...We are currently awaiting health and safety guidelines."

12. On November 6, 2020, the one-year complaint investigation timeline began.

13. The Student's November and December 2020 progress report stated the Student made little or no progress towards her goals in most areas. In reading, the Student made some progress. Several goals were marked "not applicable" or had no entry. (See Appendix A)

14. On December 3, 2020, according to the complaint, the Student began to receive 30 minutes a week of in-person services for speech/language therapy.

15. Also, on December 3, 2020, the Parent emailed the Student's special education teacher and others, asking about "how missed time will be made up." The assistant principal responded on December 9, 2020 and stated, in part:

In person services will be discussed at the IEP meeting. As an IEP team we make the decision if [Student] needs in person services, how much time, what goals, and what days services are provided. After the IEP meeting [special education teacher] would complete some paperwork and then it is district hands [sic]. There is a process that is followed to ensure the safety of students and staff. At this time we do not have any students in our building that have completed the process...

In the case of compensatory services those are typically requested by parents. I am not aware of any overarching compensatory services that will be provided to students by the district, state or federal government.

16. On December 17, 2020, the District convened the IEP team. The undated meeting notice did not state the purpose of the meeting or who would be in attendance.
17. At the December 17, 2020 IEP meeting, according to the complaint, the Parent requested in-person services because of the Student's lack of progress in many areas and regression in others. The complaint stated the Student was only making progress in identifying letters. The complaint stated the District told the Parent that if the Parent wanted in-person services, there would be no services on Wednesdays and no all-day services. To receive in-person services, a form needed to be completed and submitted to "different departments." The Parent might hear in January on the status of her request. The District offer was "take it or leave it," according to the complaint.
18. The prior written notice, dated December 17, 2020, stated the following:
 - Description of the proposed or refused action:
Parents requested to have a meeting to discuss [Student's] progress.
 - The reason we are proposing or refusing to take action is:
IEP team to meet to discuss [Student's] progress and look to see if in person learning would benefit from.
 - Description of any other options considered and rejected:
Discussed [Student] attending 4 days a week for an hour.
 - The reasons we rejected those options were:
No rejections.
 - A description of each procedure, test, record, or report we used or plan to use as the basis for taking this action is as follows:
This decision was based on data taken by teacher and parent input.
 - Any other factors that are relevant to the action:
[Student] is waiting for approval through district.
19. Also, on December 17, 2020, the Parent emailed the District's special education director about providing compensatory education to the Student to make up for services she did not receive. The email, in part, stated:
 - [Student] did not receive any therapy services from March 12 until the week of December 3 when she began speech therapy for 30 minutes per week with [SLP]. She is still not receiving...physical therapy...with [PT] nor...occupational therapy...and in fact we have had no communication whatsoever from [OT], our OT (occupational therapist).
20. In responding to the complaint, regarding developing an IEP that met the Student's unique needs, the District stated the December 2020 meeting was "never intended to result in a full IEP. The purpose of the December 2020 meeting was limited to considering the Parent's

request for in-person services and the extent to which in-person implementation of the existing IEP was needed for the Student to make progress.”

21. According to the complaint, the Parent did not have the “benefit of written progress notes” for the December 17, 2020 IEP meeting, which the complaint stated impeded the Parent’s participation and the IEP team’s ability to “make informed decision-making regarding [Student’s] progress.” The Complainant later clarified that the Parent had not received progress reports per the IEP. The District’s response included the progress reports, but the response did not address whether the Parent received the progress reports.
22. From December 21, 2020 through January 4, 2021, the District was closed for winter break.
23. According to the District, the IEP team determined “some” in-person instruction was needed. The Student began receiving some in-person instruction on January 17, 2021, and continued to receive part of her instruction in person until April 19, 2021 when the Student returned to full-time, in-person instruction at school. At that time, the Student’s IEP was fully implemented.
24. In January 2021, the Parent sent numerous emails to the District to follow up about compensatory education for the Student. Later, on March 5, 2021, the student support services supervisor replied to the Parent’s January 2021 emails:

I have discussed with the team regarding the compensatory education request to get a better understanding about what transpired...

It seems as though there may need to be some clarification between what is a related service and what is a direct (SDI) [specially designed instruction] service. Both the [occupational therapy] and [physical therapy] are related services. In saying that, they may not meet individually or have [specially designed instruction] for the students that they serve. They may support the case manager in addressing goals in the classroom.

After looking at the data and discussing the inputs and outputs, the OT and PT both have documentation of supporting the teacher within the classroom on tasks that [Student] was doing. Also, the OT and PT both supported the teacher with different strategies to help in the classroom. All of these items are considered within the realm of related services. The PT also set up some sessions with the Nanny and determined what equipment was necessary to go home to help support the [Student] during asynchronous learning. The PT is now seeing [Student] when she is at school to help support her during her [specially designed instruction]. This is also under the realm of a related service.

The SLP has services tied to specific goals. At the beginning of the year, although she was not in a 1:1 situation with [Student], she was supporting as a push-in support in the classroom. After collecting data, she determined that the push in was not the best way to get [Student] her services so she changed it to 1:1 video sessions and has come in person with [Student].

So the long of the short is, all service providers were meeting and/or exceeding the minutes on the IEP. The difference is that [occupational therapy] and [physical therapy] are related and speech is [specially designed instruction]. The related service personnel were both

supporting the push in classes all the way through, and actually exceeding the minutes that are designated on the IEP.

I hope this makes sense. When discussing 'recovery' services, we are waiting for clarification from OSPI on how to proceed and that might be the route to mitigate some educational time lost.

25. On January 22, 2021, the Student began receiving in-person instruction from 2–3 pm on Monday, Tuesday, Thursday, and Friday. Her schedule provided instruction in letter sounds/sight words, math 1:1 correspondence/AB patterns, and tracing lines/clothes pin pinch.
26. On March 8, 2021, the Parent emailed the special education teacher to request "all progressing monitoring related records, all notes, and raw data from all service delivery providers since March 2020." The Parent also stated that the related services on the Student's IEP should be changed to "direct services."
27. On March 30, 2021, the "team" met to discuss the implementation of the Student's related services and the status of the Parent's request for in-person services. As the District's response referred to the "team," it is unclear whether this was the IEP team.
28. The prior written notice, date March 30, 2021, stated the following:
 - Description of the proposed or refused action:
Parents requested an IEP to go over data of Physical therapy, occupational therapy, and speech therapy. They have also requested that [Student] attend full day in person.
 - The reason we are proposing or refusing to take action is:
[Student's] parents are requesting recovery services, parents want to see data of service minutes.
[Student's] parents also requested for full day in-person learning.
 - Description of any other options considered and rejected:
The team agreed that [Student] will benefit from full day in-person learning, will begin when transportation is set up.
Parents did not receive all data to review, that data will be sent to them and we have set up another meeting.
 - The reasons we rejected those options were:
No rejections at this time.
 - A description of each procedure, test, record, or report we used or plan to use as the basis for taking this action is as follows:
Parents will receive data by service providers and we will meet again after spring break.
 - Any other factors that are relevant to the action:
Discussed ESY and [District] getting services through ESY as well.
29. On April 19, 2021, the Student began attending a full day of in-person instruction at school.

30. On April 21, 2021, the District provided the Parent with the progress and service delivery documentation she requested in her March 8, 2021 email. In an email from the Parent to the assistant principal dated the same day, the Parent stated, in part:
- I have reviewed the data and see that all minutes have been documented as met. I am dismayed that [Student] didn't have any contact with therapists from March 2020 through December 2020, but on paper it doesn't look like she qualifies for compensatory services so I would like to focus forward...
31. An IEP meeting was scheduled for May 6, 2021, and the meeting notice dated April 28, 2021 stated the purpose of the May 6, 2021 meeting was to "review/annual IEP."
32. On May 6, 2021, the IEP team, with the Parent attending, convened to review the Student's IEP. The "Team Considerations" in the IEP were as follows:
- Communication: Student continued to benefit from speech/language communication services
 - Assistive Technology and Service: "[Student] uses a [District] loaner assistive technology device with case. [Student] is currently using an iPad with TouchChat, WordPower program and an iAdapter case."
 - Behavior: "[Student] has no behaviors that impede her learning."
 - Vision: "[Student] wears glasses and have vision consult. She is able to access print effectively and efficiently, therefore braille instruction is not needed at this time."

The Student's IEP continued with many of the same goals from the previous IEP, while dropping and adding a few goals. (See Appendix A). The IEP provided for the following special education services:

- Occupational therapy (related service): 90 minutes monthly (provided by an OT)
- Physical therapy (related service): 60 minutes weekly (provided by a PT)
- Adapted physical education: 30 minutes/once a week (provided by a general education teacher)
- Motor: 20 minutes weekly (provided by an IA)
- Communication: 120 minutes monthly (provided by an SLP)
- Math: 45 minutes/5 times weekly (provided by special education staff)
- Reading: 45 minutes/5 times weekly (provided by special education staff)
- Social/Behavior: 60 minutes/5 times weekly (provided by special education staff)
- Adapted life skills: 60 minutes/5 times weekly (provided by special education staff)
- Written language: 45 minutes/5 times weekly (provided by special education staff)

The IEP also provided the following supplemental aids and services:

- Vision services consultation: 180 minutes yearly (provided by vision teacher)
- Adapted physical education consultation: 30 minutes/2 times yearly (provided by adapted physical education teacher).

The IEP indicated the Student would spend 19% of her time in the general education setting. The IEP indicated the Student required ESY services. The IEP indicated that a "form" needed to be completed for ESY. No ESY form was included in the documentation. There was no other indication what ESY services would be provided.

33. On June 7, 2021, a "Recovery Services Planning and Communication Tool" form showed the Parent and IEP case manager met to discuss recovery services for the Student.

The complaint stated the Parent was not informed about the development of the form and was not asked for any input.

Later, on June 14, 2021, the District emailed the form to the Parent. The form stated:

What occurred before on-site services?

[Student] attended 100% of online synchronous classes but unable to work independently and need adult support the entire time. [Student] was not making sufficient progress on her goals while attending virtual learning.

What services were offered and accessed?

1:1's were a part of [Student's] remote learning but was still very difficult for her to learn virtually. Teacher/staff dropped off many materials throughout the year, and met with the family about goals and what has been successful and what may not be successful to work on at home. In January [Student] began coming to school for an hour Monday, Tuesday, Thursday and Friday.

The form stated the Student made little-to-no progress in the following services areas: adaptive life skills, social/behavior, math skills, and written language. In reading skills, the Student regressed and demonstrated learning loss. In reviewing the progress, the form stated:

[Student] showed lack of progress on many goals throughout her IEP due to the challenges of remote learning. We made some changes to her virtual learning including 1:1 work rather than group work. The family and I discussed [Student's] IEP goals at the beginning of the year about goals that were not feasible to work on at home, this was were [sic] her adapted PE goals, as well as social emotional/behavior goals, because she had no peers at home to work on with. Due to her lack of progress through virtual learning the IEP team met and agreed that [Student] would benefit from coming in an hour a day (except Wednesday) to work on her IEP goals. Though this was helpful for [Student] to help towards being successful in her goal, which some she did master, there were goals that continue to lack progress.

Decision/Rationale:

After discussion with parents and going over data, we have agreed that [Student] should receive recovery services on her academic, adaptive and social skills. Parents would like to wait until the fall to discuss SLP (speech/language pathology), OT (occupational therapy) and PT (physical therapy).

According to the documentation, recovery services fell under the "Expanded ESY & Summer Special Education Programming." Since the Student was also receiving ESY services, the Student would receive recovery services on "Monday and/or first week in August." Monday services were scheduled from 9 am to 1 pm on July 12, July 19, and July 26, 2021. Recovery services were also scheduled to be provided the first week of August 2021, from 9 am to 1 pm Monday through Friday.

34. On June 18, 2021, the 2020–2021 school year ended in the District.

35. In July 2021, the Parent exchanged numerous emails regarding confusion about where the ESY program was located and the District canceling the last week of services. The Student in all received 12 hours of recovery services, according to the complaint.

36. According to the "Recovery Services Planning and Communication Tool" form, the Student received ESY services from July 6–29, 2021 on Tuesday, Wednesday, and Thursday from 9 am to 1 pm. The recovery services were to be provided on Mondays (July 12, 19, and 26, 2021) and the first week in August from 9 am to 1 pm. Because of the lack of staff, the District canceled the services that were to be provided during the first week in August.
37. The District's response to the complaint indicated that the June 2021 decision about recovery services was "by no means the end of the inquiry." The District stated that soon it will be reviewing the Student's progress and convening the IEP team to determine what recovery services, if any, are necessary in addition to the one-week that was offered because of the cancelation of the last week of recovery services in the summer.
38. On August 3, 2021, the Parent emailed the District's "Sped records" and requested "all progress reporting for the last 2 years..." The District compliance specialist replied that the request would be forwarded to the correct department. According to the Complainant, the Parent received the progress reports in August 2021.
39. Regarding the Student's services, the District provided the following information:
- Communication: From February 27, 2020 through November 16, 2021, the SLP documented weekly therapy sessions with the Student which were described as "push-in – whole class" and "individual therapy."
 - Vision Consultation: The District also provided documentation of vision consultation services that totaled 180 minutes a year during the 2020-2021 school year.
 - Physical Therapy: From September 8, 2020 to May 13, 2021, the PT described services, in part, as mostly consulting with the Parent and school staff and procuring and setting up equipment. On May 17, 2021, the log showed the Student received direct physical therapy at school.

CONCLUSIONS

Issue 1: Implementation of IEP – The complaint alleged the District failed to implement the Student's individualized education program (IEP) during the 2020–2021 school year. A district is required to implement special education services in conformity with the student's IEP.

Beginning November 6, 2020, when the one-year complaint investigation timeline began, the Student's May 2020 IEP provided special education services in the areas of occupational therapy, physical therapy, motor, adapted physical education, communication, adaptive/life skills, math, reading, social/behavior, written language, vision consultation, and adapted physical education consultation. Because of COVID-19, the District began the 2020–2021 school year in a remote instruction format and the District provided the Student remote instruction in some areas while other areas, such as social/behavior, were not addressed.

The District, rather than provide direct service as written in the IEP, the areas of communication, occupational therapy, and physical therapy were provided as a consultation with the Parent and teachers until the Student returned to full-time, in-person instruction on April 19, 2021. The District argued that providing consultation services in lieu of direct service was consistent with the Student's IEP. However, the IEP did not clearly specify that the communication and related services

(speech, occupational and physical therapy) were to be provided using a consultation model. Thus, the plain meaning of the IEP provides for direct services and the District's implementation of these services was not in conformity with the Student's IEP. Direct speech therapy to the Student was eventually provided beginning December 2020, and direct occupational and physical therapy was provided in April 2021. The District also did not provide social/behavior services or instruction until April 2021.

While OSPI acknowledges that the COVID-19 pandemic was not the fault of the District and understands that the District faced obstacles in providing services during the 2020–2021 school year, OSPI notes that while the District attempted to provide services as under COVID restrictions, the IEP was not implemented as written. A violation is found. The District will be required to provide staff training in IEP implementation, including implementing related services. The District will also be required to provide compensatory education to the Student to make up for the services that were not implemented in conformity with the IEP.

Compensatory Services

There are two factors to consider in determining the need for and amount of compensatory services for the period between November 2020 (when the complaint timeline began) and August 2021 during summer programming (as the complaint alleged the IEP was not implemented during the 2020–2021 school year). One, the Student's special education services were not implemented in conformity with the IEP until April 2021. The exact amount of services not implemented or not benefited from is difficult to parse out. Between November 6, 2020 and mid-January 2021, the Student received services in a fully remote format, which the Student struggled to access and benefit from, and did not receive instruction in some goal areas, including adapted physical education. In mid-January 2021, the Student began to receive some services in person. And in April 2021, the Student began attending a full day of in-person services, at which time her IEP was fully implemented. However, during summer programming, the Student missed a week of recovery services as the District had to cancel the final week of recovery service due to staffing issues. The Student began to receive in-person services, including the related services, in April 2021, but as discussed below, the Student continued to make little progress into summer 2021 as a result of the Student not benefitting from remote instruction in most areas and not receiving some services in the Student's IEP.

And two, importantly, by the end of the 2020–2021 school year, the Student's progress reports and present levels showed the Student generally made little to no progress on most of the annual goals and regressed in others, such as using utensils. The Student did meet one goal in reading and made some progress on her other reading goal. The Student also made significant progress in tracing lines and walking 75 feet. The July 2021 progress report showed improvement from the June 2021 progress report. For example, in math, the Student's present level for counting items in the May 2020 IEP was two out of five. The present level for the May 2021 IEP was zero out of five. The July 2021 progress report indicated the Student's present level was two out of five, which was some progress made (although the progress made also indicated the Student had regressed on this goal and had only made up the progress lost due to this regression); the Student was at the same present level as the May 2020 IEP. Other goals indicated progress, but no data was provided.

The progress reports do generally show the Student began to make more progress when she was receiving in-person instruction and the documentation was replete with evidence that the Student could not benefit from remote instruction.

The purpose of compensatory education is to make up for the services the Student should have received to begin with, and more importantly, to place the Student in the same position the Student would have been in had the Student received the services in the first place. The District stated that if a violation were to be found related to the provision of related services, the District requested a ratio of 2:1 between the related services missed and the compensatory education ordered. However, there is no explanation of why a 2:1 ratio was appropriate for this Student. The missing services and the lack of progress and regression are inexorably intertwined and simply ordering service based on the proposed 2:1 formula is insufficient due to the lack of information on some of the Student's current levels and what rate and level of educational progress is reasonable to meet or achieve satisfactory progress towards the goals (many of which remained the same over two years). Thus, the District is required to assess the Student's present levels and the Student's rate of learning to determine the amount of compensatory services that are required for the Student to make up for the lack of progress towards the annual goals. The District and the Parent will provide OSPI with a compensatory services recommendation and an explanation of its rationale. OSPI must approve the recommendation.

Issue 2: Reporting Progress to Parent – The complaint alleged the District failed to provide the Parent with reports, documenting the Student's progress towards the annual goals. The Parent did not receive any Student progress reports until August 2021, after the Parent made a request for the Student's progress records. A district is required to provide periodic reports—at the frequency stated in the IEP—to the parents on the student's progress toward meeting those annual goals outlined in the IEP.

Here, the Student's May 2020 IEP stated progress would be reported to the Parent each District trimester. The District's documentation included progress reports, dated June 2020, November/December 2020, March 2021, June 2021, and July 2021. But there was no documentation, such as emails or date stamps, that the District sent the progress reports to the Parent even after the District began in-person instruction in April 2021. The Parents stated they did not receive these progress reports until August 2021, although the Parent did receive some progress information in April 2021. Because OSPI was unable to confirm that the progress reports were sent to the Parent prior to August 2021, a violation is found. The District is required to develop procedures for the Student's school to verify that progress reports are sent to parents.

Issue 3: Requesting IEP Meeting – The complaint alleged the District failed to convene the Student's IEP team in a timely manner following the Parent's requests for an IEP meeting. When a parent or district believes that a required component of a student's IEP should be changed and requests an IEP meeting, the district must conduct an IEP meeting if it believes that the change may be necessary to ensure the provision of a free appropriate public education (FAPE). Also, a district is required to convene a student's IEP team to address any unexpected lack of progress towards the student's goals.

Here, the Parent's request for an IEP meeting to address the Student's lack of progress and the need for in-person services dates back prior to November 6, 2020, when the complaint timeline began (the Parent began requesting a meeting in August 2020). After November 6, 2020, the Parent continued to request an IEP meeting until December 17, 2020, when the meeting occurred. The District stated the reason why the IEP could not meet sooner was because of unavailability of staff. The District gave the Parent the option of meeting without some required members, but the Parent declined that option, wanting to have the full IEP team attend.

The documentation showed that during the time period investigated in the complaint, the Student was making little-to-no progress on her IEP goals. In addition, as discussed above, the District was not fully implementing the Student's IEP. The District had a responsibility to respond both to the Parent's request for an IEP meeting in a timely manner and had an affirmative duty to address the Student's lack of progress, regardless of the Parent's request. The IEP meeting should have occurred by the time this complaint investigation period began, November 6, 2020, if not before. COVID may have complicated convening the IEP team, but it is not an excuse to delay holding a meeting until December 17, 2020 to address the Student's needs. Further, while OSPI understands the difficulty bringing together an IEP meeting, the Student has the right to have the full IEP team present and the Parent was not obligated to excuse attendees. A violation is found. The Student's school will be required to provide training on reviewing and revising the IEP to address the lack of progress and responding to parent requests.

Issue 4: Following IEP Procedures for December 17, 2021 Meeting – The complaint alleged the District failed to follow procedures in conducting the IEP meeting on December 17, 2020.

Meeting Notice: A district is required to provide the parent with timely notice of IEP meetings, including the purpose of the meeting and who will be in attendance. Here, the notice for the December 17, 2020 IEP meeting was undated, did not indicate the purpose of the meeting, and did not list the participants. This represents a procedural violation. The training ordered above will also include information on meeting notices. However, the documentation showed the purpose of the meeting was known to the Parent as it was the Parent who had been asking for the meeting for months. There was no indication from the complaint or documentation that the deficient notice impeded the Parent's participation. Thus, no Student specific corrective actions are necessary.

Unique Needs: An 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.

Here, the Parent requested in-person services to address the Student's lack of progress. Many of the Students goals remained the same over consecutive IEPs and there was documentation in the progress reports that the Student was making little to no progress in most of the areas outlined on the IEP. Although not expressed so directly, the Parent was seeking acknowledgement from the IEP team that in-person services were required for the Student to receive a FAPE. At the meeting, the IEP team essentially decided to defer the decision to the District's health and safety approval process as the prior written notice stated, "[Student] is waiting for approval through the

district.” While OSPI acknowledges the necessity of the health and safety process, it does not appear the IEP team made a decision about the need for in-person services based on the Student’s unique, disability-related needs; instead, the IEP team decision was based on a non-student specific health and safety process. Whether the Parent stated this directly, the IEP team should have begun with the question of *what* the Student required in order to receive a FAPE, before the IEP team moved to *how* FAPE would be provided, which would include consideration of the District’s health and safety protocols.

Despite all the documentation the Student was not making progress due to remote instruction, it appeared the IEP team was reluctant to state that in-person services were required for FAPE because of the distinct possibility that in-person services could not be implemented immediately (due to the health and safety procedures and largely non-Student specific factors, such as when in-person instruction would begin for all students and staffing concerns). Again, the duty of the IEP team was to offer an IEP that was reasonably calculated to provide meaningful benefit to the Student, despite the COVID restrictions. In situations where despite a district’s offer of a FAPE and best efforts to provide FAPE, the IEP still could not be fully implemented due to COVID restrictions, OSPI advised districts to proactively consider and discuss recovery services and/or compensatory services to address the loss of services and progress. Here, a violation is found based on the IEP team’s failure to address the Student’s disability related, unique needs and whether those needs required in-person services to receive a FAPE. The District will be required to provide training regarding the determination of FAPE, including the consideration of whether either in-person or remote services as necessary to provide FAPE.

Prior Written Notice: Prior written notice ensures that the parent is aware of the decisions a district has made regarding evaluation and other matters affecting placement or implementation of the IEP. The prior written notice should document any disagreement with the parent, and should clearly describe what the district proposes or refuses to initiate. A parent has a right to a written explanation of the district’s decisions, especially when there are disagreements.

Here, the December 2020 prior written notice addressed the Parent’s request for in-person services. The notice was somewhat ambiguous about the decision made by the District. Although the notice stated “no rejections,” the notice also stated “[Student] is waiting for approval through the district.” While the prior written notice could have been written with more detail and clarity, it is implied that the decision was to essentially wait for District approval for the in-person instruction request. Again, as discussed above, the IEP team should not have waited for approval from the District to determine if in-person services were required for the Student to receive FAPE, even if further health and safety procedures needed to be considered to determine the details of a plan to provide in-person services. However, the notice did reflect the decision of the IEP team, which was to, mistakenly, defer the decision to the “District” because health and safety reasons. OSPI finds the prior written notice was sufficient and finds no violation. However, OSPI recommends the District review training needs around prior written notice as best practices would include writing a prior written notice such as this with more detail and clarity.

Issue 5: Recovery Services – The complaint alleged the District failed to follow procedures in determining recovery services.

Recovery services is a term used by OSPI to describe the special education and related services and supports provided to students with disabilities to address the ongoing impact of the COVID-19 pandemic and spring 2020 school facility closures. Recovery services, which may include compensatory services, provide additional special education and related services to students with disabilities and are designed to address lack of appropriate progress on IEP goals, due to missed or limited special education and related services or for other reasons as a result of the pandemic. Importantly, recovery services decisions are not the result of a dispute, but rather should be a collaborative response and decision by the IEP team.

OSPI's guidance calls for the recovery services to be determined by the Student's IEP team, which includes the Parent. Any decision made by the IEP team about recovery services should be documented in a prior written notice, which would be provided to the Parent to explain the District's proposed actions and rationale. Here, the District's "Recovery Services Planning and Communication Tool" form stated the IEP case manager and the Parent met on June 7, 2021 to determine the recovery services for the Student. However, the complaint stated the Parent was not informed about the form and did not participate in its development. The Parent received a copy of the form on June 14, 2021, after it was already filled out. No prior written notice was included. The District provided the Student with limited recovery services during the summer and then canceled the last week of services. Based on the District failing to follow procedures for determining recovery services, specifically including the Parent in the decision making process, a violation is found. As OSPI has ordered the District to involve the Parent in putting together a proposal for compensatory services, OSPI finds that the corrective action for issue one is sufficient to address this violation as well. As part of that proposal, the District and Parent will consider whether additional recovery services are needed to address the full scope of time impacted by the pandemic, in addition to the compensatory services which address the time period investigated in this complaint (November 6, 2020 through August 2021). The District will also address recovery services in its required training.

CORRECTIVE ACTIONS

By or before **January 28, 2022, February 4, 2022, February 18, 2022, and March 4, 2022**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Assessment and Compensatory Education

By **January 21, 2022**, the District is required to conduct an assessment of the Student's skills to determine the present levels and the Student's rate of progress.² Based on the information, the District and the Parent will recommend to OSPI the amount of compensatory education needed to make up for the lack of services and progress that occurred from November 6, 2020 through August 2021. The recommendation must include a rationale for the decision. Based on the amount of compensatory education, the District and Parent will develop a plan for implementation.

² The District and the Parent also have the option of having an independent evaluator conduct the assessment and make recommendations for the Student compensatory education.

The District and Parent will consider whether additional recovery services are needed to address the full scope of time impacted by the pandemic, in addition to the compensatory services which address the time period investigated in this complaint.

The amount of compensatory education and the implementation must be approved by OSPI. If there is a disagreement between the District and the Parent, OSPI will make the final determination.

By **January 28, 2022**, the District will provide OSPI with the compensatory education recommendation and implementation plan. OSPI will provide feedback as necessary for approval. Once approved, OSPI will develop a timeline to track the implementation of services.

DISTRICT SPECIFIC:

Training

By **February 25, 2022**, the District will arrange for the Puget Sound Educational Service District (ESD) 121 to provide training to all certified special education staff and administrators at the Student's school in the following areas:

- Implementation of related services in a direct and consultation model, including review of how each model is document in an IEP;
- Responding the parent requests for IEP meetings;
- Reviewing and revising the IEP to address a lack of expected progress;
- Addressing IEP team decision making around whether in-person and/or remote services are required for FAPE; and,
- Determining recovery services.

The training will include reviewing the findings from the complaint.

By **February 4, 2022**, the ESD will provide OSPI with a copy of the training materials. OSPI will review the materials and provide feedback.

By **March 4, 2022**, the District will provide verification to OSPI that all necessary staff at the Student's school received the training.

Progress Reporting Procedures

By **February 11, 2022**, the District will develop procedures to ensure progress reports are sent to parents in a timely manner. By **February 4, 2022**, the District will provide OSPI with of the proposed procedures. OSPI will provide feedback necessary for approval.

By **February 18, 2022**, the District must provide verification to OSPI that all certified special education staff and administrators were provided a copy of the procedures.

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.

RECOMMENDATION

OSPI recommends the District review training needs around prior written notice. Here, the December 2020 prior written notice was minimally sufficient. However, best practices would include writing a prior written notice such as this with more detail and clarity.

Dated this ____ day of January, 2022

Glenna Gallo, M.S., M.B.A.
Assistant Superintendent
Special Education
PO BOX 47200
Olympia, WA 98504-7200

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

IDEA provides mechanisms for resolution of disputes affecting the rights of special education students. This decision may not be appealed. However, parents (or adult students) and school districts may raise any matter addressed in this decision that pertains to the identification, evaluation, placement, or provision of FAPE to a student in a due process hearing. Decisions issued in due process hearings may be appealed. Statutes of limitations apply to due process hearings. Parties should consult legal counsel for more information about filing a due process hearing. Parents (or adult students) and districts may also use the mediation process to resolve disputes. The state regulations addressing mediation and due process hearings are found at WAC 392-172A-05060 through 05075 (mediation) and WAC 392-172A-05080 through 05125 (due process hearings.)