

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-61

PROCEDURAL HISTORY

On May 13, 2022, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Woodland School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, with regard to the Student's education.

On May 16, 2022, OSPI acknowledged receipt of this complaint and forwarded a copy of it to the District superintendent on the same day. OSPI asked the District to respond to the allegations made in the complaint.

On May 23, 2022, the District requested an extension of time to respond to the complaint. OSPI approved the extension to June 7, 2022.

On May 16, 24, 25, 27, and 31, 2022, OSPI received additional information from the Parent. OSPI forwarded the information to the District on June 2, 2022.

On June 6, 2022, OSPI received additional information from the Parent. OSPI forwarded the additional information to the District on June 6, 2022.

On June 7, 2022, OSPI received the District's response to the complaint and forwarded it to the Parent on June 9, 2022. OSPI invited the Parent to reply.

On June 9, 2022, OSPI received additional information from the Parent. OSPI forwarded the information to the District on June 10, 2022.

On June 9, 2022, the Parent requested an indefinite extension of time to submit her reply. OSPI approved the extension in part to June 29, 2022.

On June 27, 2022, the Parent again requested an indefinite extension of time to submit her reply. OSPI denied the request.

On June 30, 2022, OSPI received the Parent's reply to the District's response. OSPI forwarded the reply to the District on the same day.

On July 7, 2022, OSPI interviewed the District special education director.

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 May 14, 2021. These references are included to add context to the issues under investigation and

are not intended to identify additional issues or potential violations, which occurred prior to the investigation period.

ISSUES

1. Did the District ensure special education disciplinary procedures were followed according to WAC 392-172A-05140 through 392-172A-05175 when the Student was suspended?
2. Did the District ensure procedures were followed in determining extended school year services for the Student?
3. Did the District consider recovery services/compensatory education for the Student to make up for school facility closures due to the pandemic?
4. Did the District ensure the Student's individualized education program (IEP) was implemented, specifically with respect to speech therapy, occupational therapy, and physical therapy?

LEGAL STANDARDS

Disciplinary Removals – No Change of Placement: School districts may remove a student eligible for special education who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days to the extent those alternatives are applied to students without disabilities and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement under WAC 392-172A-05155. A school district is only required to provide services during periods of removal to a student eligible for special education who has been removed from his or her current placement for ten school days or fewer in that school year, if it provides services to a student without disabilities who is similarly removed. 34 CFR §300.530; WAC 392-172A-05145.

When a district removes a student from school for disciplinary reasons, it must make sure that the removal is consistent with state laws and regulations governing discipline for all students. When a district removes a student eligible for special education from school for a stated period of time, but does not characterize that removal as a "suspension," it must be determined whether that action was in fact a disciplinary one (that is, used as a form of corrective action or punishment). WAC 392-400-205(1) (defining "discipline"). It must also be determined whether the removal resulted in a change of that student's educational placement. 34 CFR §300.530; WAC 392-172A-05145.

Extended School Year Services: Extended school year (ESY) services means services meeting state standards provided to a student eligible for special education that are beyond the normal school year, in accordance with the student's IEP, and at no cost to the parents of the student. School districts must ensure that ESY services are available when necessary to provide a FAPE to a student eligible for special education services. ESY services must be provided only if the student's IEP team determines, based on the student's needs, that they are necessary in order for the student to receive a FAPE. The purpose of ESY services is the maintenance of the student's learning skills or behavior, not the teaching of new skills or behaviors. School districts must develop criteria for determining the need for ESY services that include regression and recoupment time based on

documented evidence, or on the determinations of the IEP team, based on their professional judgment and considering the nature and severity of the student's disability, rate of progress, and emerging skills, among other things, with evidence to support the need. For purposes of ESY, "regression" means significant loss of skills or behaviors if educational services are interrupted in any area specified in the IEP. "Recoupment" means the recovery of skills or behaviors to a level demonstrated before interruption of services specified in the IEP. 34 CFR §300.106; WAC 392-172A-02020. A student's IEP team must decide whether the student requires ESY services and the amount of those services. In most cases, a multi-factored determination would be appropriate, but for some children, it may be appropriate to make the determination of whether the child is eligible for ESY services based only on one criterion or factor. *Letter to Given*, 39 IDELR 129 (OSEP 2003).

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).

Recovery Services: Recovery services are intended to mitigate the impact of COVID-19 school facility closures and pandemic generally 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 because of COVID-related reasons. Districts should examine the effect of COVID-19 and the special education and related services provided during the pandemic 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).

IEP Implementation: A district must ensure it provides all services in a student's IEP, consistent with the student's needs as described in that IEP. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Baker v. Van Duyn*, 502 F. 3d 811 (9th Cir. 2007).

FINDINGS OF FACT

Background: 2020–2021 School Year

1. During the 2020–2021 school year, the Student was a third grader who attended a District elementary school. The Student was eligible for special education services under the category of traumatic brain injury.

2. On April 29, 2021, the District held an annual review of the Student's individualized education program (IEP) (to be implemented from April 29, 2021 to April 28, 2022). The Student had significant medical issues that required a 1:1 paraeducator to assist the Student with health, communication, and behavior issues. The Student's IEP included a behavioral intervention plan (BIP) that addressed "throwing, hitting, or kicking staff or students." The IEP provided annual goals and services to meet those goals in the areas of social/emotional, adaptive behavior, math, reading, written language, communication, and gross motor. The Student's placement was changed to an out-of-state behavioral program (program 1). The IEP provided no extended school year (ESY) services.

The IEP stated:

The IEP team has met and determined an outside placement is necessary due to behavioral concerns. In this placement, he will not have access to participate with students in the general education classroom. He has been placed in [program 1] at [school] in their Functional Living Skills program. Due to Covid-19 restrictions, [Student] will be attending school there 2 days a week in person. The other 3 days a week he will attend [elementary school's] [program]. Once [program 1] has lifted restrictions, he will attend school there full time...

The Student's IEP provided the following services:

- Communication: 120 minutes, one time per month
- Adaptive: 90 minutes, 5 times per week
- Social/emotional: 92 minutes, 5 times per week
- Academic written language: 30 minutes, 5 times per week
- Academic reading: 60 minutes, 5 times per week
- Academic math: 45 minutes, 5 times per week
- Physical therapy (PT): 120 minutes, one time per month
- Occupational therapy (OT): 120 minutes, one time per month

Supplementary aids and services in the IEP included the following:

- 1:1 paraeducator (lunch): 30 minutes, 5 times per week
- 1:1 paraeducator: 335 minutes, 5 times per week

3. The prior written notice stated the option of having the Student attend program 1 two days a week and attend the other days virtually was rejected because the Student would not "be able to engage in his school work virtually." The prior written notice did not indicate any disagreement regarding the IEP team decisions.
4. According to the Parent's reply to the complaint, the Parent's attorney argued that the District failed to use the correct criteria for determining ESY services in April 2021 for the Student and did not base the decision on sufficient data.

Complaint One-Year Timeline Began May 14, 2021

5. On June 15, 2021, the school year ended in the District and program 1.

6. On June 21, 2021, a friend of the Parent emailed the student services – related services and functional living skills supervisor (supervisor) for the out-of-state district where program 1 was located on behalf of the Parent, asking about the District’s criteria for ESY services. The supervisor replied, “[Student] did not qualify for ESY, in that he did not demonstrate a regression of skills that was not recovered with 4-6 weeks of a break. That is the criteria that [out-of-state district] uses to offer summer support programming.” A teacher on special assignment further clarified the following:

When determining ESY (Extended School Year), we are looking for a loss of learning (regression) or regaining of learned skill (recoupment) over extended periods of time (winter, spring and summer break). As [Student] started with [out-of-state district] late in the school year, there was not an extended period of time to analyze data. However, we were able to look at the data on a weekly basis using weekends as a 'break'. So in looking at [Student]’s classroom data he was meeting his learning goal around 75-100% weekly. There was not a dip in the data over the weekend.¹

Given that, [Student] does not meet the criteria of ESY for this year with [out-of state district]. However, the classroom now has baseline data and will be able to begin to see if [Student] would qualify for ESY next year as the team would be able to resume classroom data on his learning goals for the fall.

7. The Parent’s attorney stated the June 2021 email was the District’s refusal to provide the Student with ESY and that it should be considered within the one-year complaint timeline.

2021–2022 School Year

8. At the beginning of the 2021–2022 school year, the Student was a fourth grader who attended program 1 and continued to be eligible for special education services.
9. On September 1, 2021, the school year began in program 1.
10. On October 21, 2021, the Student was suspended due to “an assault to a staff member.” The Student was able to return to school on the following Monday, October 25, 2021.
11. The Parent’s attorney argued that the District failed to follow the state general education disciplinary procedures. The District failed to document how the Parent received notice of the suspension and failed to inform the Parent about appeal rights.
12. On October 25, 2021, the District conducted a “review amendment” of the Student’s IEP. According to the prior written notice, the IEP team discussed updating the Student’s present levels, amended the behavior goal, rewrote the functional behavioral assessment (FBA) and BIP, and determined a new program placement (program 2) in the same out-of-state district would be appropriate for the Student. The FBA and BIP revisions were put on hold pending the new placement. The notice also noted that the Parent asked about the ESY determination

¹ The reply from the Parent’s attorney argued that insufficient data was collected because it was collected only over one weekend.

and why the Student did not “qualify.” It was unclear when the Student began attending program 2.

13. On October 27, 2021, the Parent appealed the Student’s suspension under the state general education discipline regulations. The District concurred with the Parent and the suspension was removed from the Student’s disciplinary record.
14. According to the District’s response, COVID-19 significantly impacted the implementation of services to the Student. The response stated, “[Program 2] serves students in a 1:1 ratio, and when that ratio cannot be maintained due to staff absences, it must shift to continuous distance learning (CDL).”
15. The Parent’s attorney stated that program 1 offered the Student CDL in place of in-person instruction nine days during the Student’s attendance from September 1 to October 25, 2021 when the Student’s program was changed to program 2. The nine days of CDL were based on attendance data and the recollection of the Parent. The Parent’s attorney also stated that program 2 “failed to staff him for 30 days out of the 130 days that it was responsible for. Instead, it offered him CDL (virtual learning) for these days.”
16. According to the documentation, program 2 transitioned to CDL for a total of 30 days during the 2021–2022 school year. There was no indication from the District when program 1 offered CDL in place of in-person instruction. While the Student attended program 2 from around October 25, 2021 to May 13, 2022, the date the complaint was filed, the Student transitioned to CDL for 20 days because of school closures.
17. According to the complaint, the Parent was clear she believed that the Student could not benefit from any CDL and refused any remote services. But according to the District special education director, although not ideal, the Student could have benefitted from some CDL with supports had the District had the opportunity to provide services. However, this was not discussed during IEP meetings because, despite the District’s opinion, the District supported the Parent’s preference for in-person instruction only.
18. On November 22, 2021, program 2 provided a report on the Student’s progress toward the annual goals. The report provided the following information:
 - Written language (upper and lower case letters): Making progress towards goal
 - Reading (letters): Making progress towards goal
 - Math (numbers): Expected to meet goal
 - Social/Emotional (reduce behaviors): Progress not made towards goal
 - Adaptive behavior (maintaining attention): Expected to meet goal
 - Communication (what, where questions): Making progress towards goal
19. From December 20–31, 2021, program 2 was on winter break.
20. On January 6, 2022, the District held an IEP meeting that included 20 participants to discuss ESY and conducting an FBA for the Student. The prior written notice documented the following:

[Parent] requested an IEP meeting to discuss concerns. The IEP Team...met virtually and the following items were proposed:

Description of the proposed or refused action:

1. Parent asked if a new FBA or BIP needed to be done now [Student] is settled at [program 2]. (Team Refused).
2. Discussion if [Student] was getting OT, PT, and Speech services. He wasn't getting PT because the district didn't have a PT on staff however 1 was recently hired. Parent asked about compensatory services. [Administrator at [program 2]] looked into it and determined he will. (Team accepted).
3. Parent asked about ESY data. The [program 2] IEP team is still collecting data from prior to break and present time. Data will be shared when available. (On hold).
4. Parent asked about [Student] having access to an iPad all day. (Team rejected).
5. IEP team discussed changing [Student's] behavior goal. (Team accepted).
6. Parent requested month progress in addition to the daily notes home and it will be added as an accommodation. (Team accepted).
7. Parent requested whole team meeting every 4-6 weeks. (Team rejected).

The reason we are proposing or refusing to take action is:

1. The team above agreed to refuse to take action on doing a new FBA or BIP. The reason the team isn't taking action is because [Student] has been at his new setting for about 5 weeks with 2 weeks off. The team agreed he is still responding to strategies in them. The team agrees to redo the the FBA/BIP at his re-evaluation next year but not at this time.
2. The team discussed [Student] not getting PT services because there wasn't one on staff. The team agreed he needs PT services and brainstormed ways he could get it. [Program 2] principal informed the team that a PT was hired. The team agreed he would benefit from compensatory services and they will be provided.
3. See below.
4. The team agreed that [Student] having access to 2 classroom iPads throughout the day was sufficient and it didn't need to be added into his IEP. He has access to one almost all day.
5. The IEP team agreed to change his behavior goal to a strengths-based behavior goal. The IEP team adjusted one that was proposed and it is changed.
6. The IEP team agreed to provide monthly progress updates as an accommodation to help Parent stay informed on his progress.
7. The team denied meeting every 4-6 weeks because the WRAP team meets monthly and includes a team member from the school.

Description of any other options considered and rejected:

3. The IEP team discussed ESY.

The reasons we rejected those options were:

The reason it was rejected was because we are still in the window of collecting data to see if he recoups lost skills.

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:

Parent input, team discussion, current progress.

Any other factors that are relevant to the action:

[Parent] is opting out of Washington State Assessments.

21. In February 2022, the District conducted an OT assessment to evaluate the Student's strengths and needs. The report recommended OT consultation and direct OT services to the Student.

22. On February 16 and March 9, 2022, the District convened the Student's IEP team to discuss the impact of CDL on the Student's education. The Parent was frustrated when CDL was offered in place of in-person instruction when program 2 was closed because of COVID. According to the prior written notice, the Parent requested a residential placement due to the disruption of services while attending program 2 and requested "two alternative placement options" when the program cannot provide in-person instruction. Regarding the residential placement, the District stated the District must evaluate the Student before determining whether the Student required a residential setting. The District also rejected the Parent's request for alternative placement options:

[Student's] behavioral concerns significantly impede his ability to learn and make educational progress in a general education setting. [Student's] IEP includes placement in a public separate day school, and the team agreed that [program 2] can meet [Student's] needs when it provides services in-person. The District has reached out to alternative day treatment centers but none of them are taking additional students at this time. The District will initiate the reevaluation process to identify [Student's] current needs, which will enable the team to determine whether changing his placement to residential is appropriate.

The team agreed that [Student] has not successfully engaged in remote learning when [out-of-state program 2] has transitioned to CDL, it will need to convene to determine the extent to which [Student] requires recovery services to address any skill loss attributable to [out-of-state program 2's] intermittent days of CDL. Parent expressed her concern that [Student's] unsafe behaviors are increasing in the home, and that he requires consistency in order to thrive across all settings. The District will follow-up separately to initiate the reevaluation process, and it agreed to continue researching potential outside placement options while the reevaluation process takes place.

23. At the March 9, 2022 IEP meeting, the Parent stated the disruptions in services were causing significant behavioral problems at home with the Student that were difficult to manage. The Parent focused on the Student's challenges at home rather than progress at school.

24. On March 11, 2022, program 2 issued another progress report for the Student. The report provided the following progress information:

- Written language (upper and lower case letters): Making progress towards goal
- Reading (letters): Making progress towards goal

- Math (numbers): Regression from baseline performance
- Social/Emotional (reduce behaviors): Making progress towards goal
- Adaptive behavior (maintaining attention): Regression from baseline performance
- Communication (what, where questions): Making progress towards goal

25. From March 21 through March 25, 2022, program 2 was on spring break.

26. Program 2 provided the “[program 2] ESY DATA SUMMARY TO SUPPORT ESY DECISION” form for both winter and spring 2021–2022 school breaks to measure the Student’s regression and recoupment. The data showed a combination of growth, loss, and maintenance of IEP skills during the school breaks.

27. On April 27, 2022, the District invited 23 participants, including the Parent and the Student, to meet to review the results of the most recent evaluation that included assessments in the areas of adaptive behavior, academic, gross motor, medical-physical, general education, cognitive, communication, fine motor, and social/emotional behavioral to consider a change of placement for the Student. The evaluation summary stated the following:

Compared to other students his age, [Student] demonstrates significant delays in his cognitive skills, adaptive skills, social/emotional/behavioral skills, communication skills, and academic skills. Since attending [program 2], [Student] has made some improvement with his social/emotional/behavioral skills, but continues to be significantly delayed in this area compared to same-aged peers. His adaptive skills continue to be significantly delayed. While he continues to demonstrate a need for specially designed instruction in the area of communication, he has made growth in this area since attending [program 2]. Academically, [Student] has also demonstrated progress in his goals since attending [program 2]. He still continues to demonstrate significant delays compared to same-aged peers and would continue to benefit from receiving specially designed instruction in the areas of reading, writing, and written language.

According to the prior written notice, the Student’s team needed to reschedule the meeting because the Parent did not attend.

28. The District’s response to the complaint stated the District proposed a neuropsychological assessment conducted by a private neuropsychologist, but at the time of the response, the Parent did not provide consent for the evaluation and a release of medical information to the District.

29. On May 11, 2022, the Student’s team met virtually and conducted an annual review of the IEP that the Parent attended. The IEP provided annual goals and accompanying benchmarks/short-term objectives in the areas of social/emotional, adaptive behavior, math, reading, written expression, communication, fine and gross motor, and physical therapy. The IEP provided the following special education services:

- Communication: 90 minutes monthly
- Adaptive behavior: 60 minutes daily
- Social/Emotional/Behavioral: 60 minutes, 5 times weekly
- Written language: 232 minutes weekly
- Reading: 320 minutes weekly
- Math: 320 minutes weekly

- Communication: 20 minutes, 5 times weekly
- Fine motor: 50 minutes daily
- PT: 30 minutes weekly
- OT: 120 minutes monthly
- Transportation

Supplemental aids and services in the IEP included the following:

- Speech/Language pathologist consultation: 240 minutes yearly
- 1:1 Paraeducator lunch supervision: 30 minutes, 5 times weekly
- OT consultation: 240 minutes yearly
- PT consultation: 180 minutes yearly
- Behavior consultant: 120 minutes yearly
- 1:1 Paraeducator: 360 minutes, 5 times weekly

The IEP provided ESY services. The "Extended Year Services" form showed the Student would receive the following services from July 6 to July 26, 2022:

- Math: 50 minutes weekly
- Communication: 20 minutes daily
- Reading: 50 minutes weekly
- Written language: 50 minutes weekly
- Social/Emotional/Behavioral: 55 minutes, 2 times weekly

Regarding the Student's placement, the IEP team determined the Student's placement would continue at program 2, which met the Student's needs.

30. The Parent's attorney argued that the ESY services were insufficient to meet the Student's significant needs, and that the decision was not individualized and less than half what other students received through the District's summer program, which ran from June 21 through July 8, 2022, five half days a week.

31. The Student's IEP team also addressed recovery services. The "Recovery Services Decision Making Form" stated the Student would receive the following recovery services concurrently with ESY services during July 2022. The form stated services would be provided three hours a day during July, which the District clarified to be concurrent with ESY times. (In parentheses is approximately the total service time offered and service time missed):

- Reading: 50 minutes, per week (1.7 hours offered – 30 hours missed)
- Math: 50 minutes, per week (1.7 hours offered – 23 hours missed)
- Written language: 50 minutes, per week (1.7 hours offered – 15 hours missed)
- Communication: 90 minutes, per month (.75 hours offered – no time missed)²
- Social/Emotional/Behavioral: 60 minutes throughout the day (20 hours offered – 46 hours missed)
- Adaptive behavior: 50 minutes per week (1.7 hours offered – 45 hours missed)

² According to the documentation, since the communication services were provided monthly, program 2 had more flexibility in making up services when the Student did not attend CDL and was able to meet the service minutes.

The prior written notice, dated May 13, 2022, stated that although the Student had made growth since the previous IEP, the Student “qualified” for both ESY and recovery services.

32. Also, on May 13, 2022, the Parent filed this complaint with OSPI.

33. Regarding the implementation of the speech, OT, and PT services, the District’s response stated that although the Student did not receive all of the services required by the IEP, the District “addressed the discrepancy in service minutes provided during certain months by providing recovery services in other months, and as a result, the Student made progress toward his IEP goals in those areas.” The District provided detailed records of when the services were provided. Significantly, no PT services were provided from September 2021 to April 1, 2022. The District response stated that recovery services were provided to the Student sua sponte, although there was no indication from the documentation that there was a formal offer regarding recovery services made to the Parent until the May 2022 IEP meeting.

CONCLUSIONS

Issue One: Suspension – The complaint alleged the District failed to follow disciplinary procedures when it suspended the Student on October 21, 2021. Upon investigation, the Parent’s allegation was that general education discipline regulations were not followed, which is outside of the scope of OSPI’s authority to investigate in a special education community complaint. Further, as the Student was only suspended one day and as a result—his placement was not changed via discipline—the additional protections afforded by the special education discipline regulations did not come into play. OSPI finds no violation as the special education discipline regulations were not applicable.

Issue Two: Extended School Year (ESY) – The complaint alleged the District failed to follow procedures in determining ESY services for the Student. School districts must develop criteria for determining the need for extended school year services that include regression and recoupment time based on documented evidence, or on the determinations of the IEP team, based upon the professional judgment of the team and consideration of factors, including the nature and severity of the student's disability, rate of progress, and emerging skills, with evidence to support the need.

April 2021 ESY Decision: In April 2021, the District conducted an annual review of the Student’s IEP. The team determined the Student did not need ESY services. In June 2021, the out-of-state district sent an email, clarifying the ESY criteria. Although the Parent’s attorney argued that the email brings the ESY issue within the complaint’s one-year timeline, the actual decision regarding ESY was made in April 2021, which was outside the one-year timeline that began on May 14, 2021. The June 2021 email was merely clarifying the decision that had already been made. Since the issue was outside the timeline, OSPI cannot render a decision regarding whether the April 2021 ESY decision is a violation.

May 2022 ESY Decision: Before and after the 2021–2022 school year winter and spring breaks, program 2 collected data on regression and recoupment of the Student’s IEP skills. The data reflected growth, maintenance, and regression of the Student’s skills. In May 2022, the IEP team

determined the Student required ESY services in the areas of math, reading, written language, communication, and social/emotional/behavior and that ESY services would be provided during the month of July. The Parent's attorney stated that the amount of ESY services offered did not meet the significant needs of the Student. The attorney argued that the decision about the frequency and duration of services was not individualized and provided much less service time than what was provided to other students in the District's summer program. However, the documentation showed that the District's decision was based on the collection of Student-specific data, which showed some improvements, some maintenance of skills, and some regression of skills over breaks that the ESY services addressed. Because the decision was based on Student-specific data and was consistent with the Student's abilities and needs, no violation is found.

Issue Three: Recovery Services/Compensatory Services – The complaint alleged the District failed to consider recovery/compensatory services for the Student to make up for school closures due to the COVID pandemic. Recovery services are intended to mitigate the impact of COVID-19 school facility closures and pandemic generally 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 because of COVID-related reasons. 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.

Here, the Student's April 2021 and May 2022 IEPs provided services in several areas, including social/emotional/behavior, adaptive behavior, reading, math, written language, and communication. The Student's program was based on 1:1 and sometimes 2:1 (adult to students) instruction. The District explained that COVID had a impact on the program, primarily in that staff would sometimes contract COVID, which necessitated the Student's program being close for the day. When programs 1 and 2 closed, the Student would be offered continuous distance learning (CDL) in place of in-person instruction. However, both the Parent and District agreed, at least on paper, that the Student could not benefit from CDL. Thus, when the program closed, because the Student could not benefit from CDL, he received no instruction. Based on the documentation, the Student did not receive in-person instruction for approximately 29 days. In May 2022, the District offered recovery services to make up for the in-person instruction that was missed because of COVID. But the amount of services offered as recovery services was significantly lower than the amount of services that was missed. For example, the Student missed 30 hours of reading instruction and the District offered 1.7 hours of recovery services. Even taking into account that the Student made some progress, the amount of service time offered as recovery services was not consistent with the Student's abilities and needs and was insufficient to return the Student to the level of performance had the Student received the services to begin with. A violation is found.

In light of the Student's progress in most areas and the fact that the District did offer some recovery services, OSPI will reduce the total service time in each area missed by 2/3 and require the District to provide the compensatory services listed below. These hours may include any recovery/compensatory services the District has already provided to the Student since May 13, 2022, the date of the complaint.

Issue Four: Implementation of Services – The complaint alleged the District failed to implement the special education services, specifically speech, occupational therapy, and physical therapy, in conformity with the Student’s IEP. A district is required to implement services in conformity with the IEP.

The Student’s April 2021 and May 2022 IEPs provided occupational therapy and communication (or speech) for 120 minutes per month. For physical therapy, the April 2021 IEP provided 120 minutes per month to the Student and the May 2022 IEP provided physical therapy for 30 minutes per week. According to the documentation, the District provided the communication and occupational services because given the flexibility of monthly services offered, services were not impacted by the program closures and the program was able to make services up as needed throughout the year.

However, the documentation showed that no physical therapy services were provided from the beginning of the 2021–2022 school year to April 1, 2022. In addition, no physical therapy was provided on April 22 and May 6, 2022 because the school was closed due to COVID. As result, the Student missed approximately 15 hours of physical therapy. OSPI finds a violation related to the failure to provide physical therapy services. The District is required to provide 15 hours of compensatory physical therapy services to the Student.

CORRECTIVE ACTIONS

By or before **August 5, 2022, September 15, 2022, January 13, 2023, March 15, 2023, and May 19, 2023**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **July 29, 2022**, the Parent and District will develop a schedule for the following hours of compensatory education and notified OSPI of the schedule:³

- Reading: 10 hours
- Math: 8 hours
- Written language: 5 hours
- Social/Emotiona/Behavioral: 15 hours
- Adaptive behavior: 15 hours
- Physical therapy: 15 hours

By **August 5, 2022**, the District will provide OSPI with a copy of the compensatory education schedule.

³ Although the District offered communication services as recovery services, OSPI is not ordering compensatory services for communication services because there was no failure to provide the communication services in the IEP.

The Student's IEP team can agree to provide the compensatory education services through any combination of the following: provided compensatory education services this summer; and provided additional services outside of the District's school day during the 2022–2023 school year, including extended days, weekends, and District breaks.

Unless otherwise agreed to by the District and Parent, services will be provided by a certified special education teacher or related service provider. Services may be provided in a 1:1 setting or a group setting, as appropriate. 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 **May 12, 2023**.

By or before **September 15, 2022, January 13, 2023, and March 15, 2023**, the District will provide OSPI with updates about its progress in providing the Student with the compensatory education services identified above. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled or missed by the Student. By or before **May 19, 2023**, the District must provide OSPI with documentation that it has completed compensatory services for the Student.

The District either must provide the transportation necessary for the Student to access these services or reimburse the Parent for the cost of providing transportation for these services. If the District reimburses the Parent for transportation, the District must provide reimbursement for round trip mileage at the District's privately-owned vehicle rate. The District must provide OSPI with documentation of compliance with this requirement by **May 19, 2023**.

DISTRICT SPECIFIC:

None.

The District will submit a completed copy of the Corrective Action Plan (CAP) Matrix documenting the specific actions it has taken to address the violations and will attach any other supporting documents or required information.

Dated this ____ day of July, 2022

Dr. Tania May
Assistant Superintendent of Special Education
PO BOX 47200
Olympia, WA 98504-7200

THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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