

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 21-83

PROCEDURAL HISTORY

On October 29, 2021, the Office of Superintendent of Public Instruction (OSPI) received a Special Education Community Complaint from the parent (Parent) of a student (Student) attending the Seattle 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 October 20, 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.

Separately, on October 20, 2021, OSPI received additional information from the Parent regarding SECC 21-83. OSPI forwarded that information to the District the same day.

On November 4, 2021, the District requested and OSPI granted the District's request for an extension of time for the submission of its response.

On November 5, 2021, OSPI received Part 1 of the District's response to the complaint and forwarded it to the Parent on November 8, 2021. OSPI invited the Parent to reply.

On November 9, 2021, OSPI received Part 2 of the District's response to the complaint and forwarded it to the Parent on November 10, 2021. OSPI invited the Parent to reply.

On the following dates, OSPI received additional information from the Parent: November 15, 17–18, 21–24, 30, and December 6–8, 2021. OSPI forwarded this additional information to the District on December 7 and 9, 2021.

On December 6, 2021, OSPI determined that additional information would be helpful to the investigation and contacted the Parent. OSPI received the requested information from the Parent on December 6, 2021. OSPI forwarded that information to the District on December 9, 2021.

On December 6, 2021, OSPI determined that additional information would be helpful to the investigation and contacted the District. OSPI received the requested information from the District on December 7, 2021. OSPI forwarded that information to the Parent on December 9, 2021.

On December 9, 2021, OSPI received additional information from the District. OSPI forwarded this additional information to the Parent on December 10, 2021.

On December 10, 2021, OSPI received additional information from the Parent. OSPI forwarded this additional information to the District the same day.

OSPI considered all information provided by the Parent and the District as part of its investigation.

SCOPE OF INVESTIGATION

OSPI can only investigate allegations that occurred within the past calendar year (from the date that OSPI received the complaint). Therefore, any information included from events prior to October 20, 2020 is mentioned for informative, background purposes only.

ISSUE

1. During the 2021–2022 school year, did the District follow proper procedures for implementing any determinations the Student’s individualized education program (IEP) team made for providing the Student with recovery services?

LEGAL STANDARDS

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 individualized education program (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).

IEP Implementation: Each 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).

Compensatory Education: A state educational agency is authorized to order compensatory education, as appropriate, through the special education community complaint process. 34 CFR §300.151(b)(1); WAC 392-172A-05030. The state educational agency, pursuant to its general supervisory authority, has broad flexibility to determine appropriate remedies to address the denial of appropriate services to an individual child or group of children. *Letter to Lipsitt*, 181 LRP 17281 (2018). 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); *See also, Letter to Lipsitt*, 181 LRP 17281 (2018) (“The purpose of a compensatory services award is to remedy the public agency’s failure to provide a child with a disability with ‘appropriate services’ during the

time that the child is (or was) entitled to a free appropriate public education and was denied appropriate services.”)

There is no requirement to provide day-for-day compensation for time missed. *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 21 IDELR 723 (9th Cir. 1994). “There is no statutory or regulatory formula for calculating compensatory remedies. However, generally services delivered on a one-to-one basis are usually delivered effectively in less time than if the services were provided in a classroom setting. It is common in Washington for such one-to-one services to be calculated at half of the total hours missed.” *In re: Mabton School District*, 2018-SE-0036.

FINDINGS OF FACT

2020–2021 School Year

1. At the start of the 2020–2021 school year, the Student was eligible for special education services under the category of specific learning disability, was in the sixth grade, and the Student was part time enrolled in the District. The Student attended a private school but received special education services at a District middle school. At that time, the Student’s December 2019 IEP was in effect.

2. The District’s response included a prior written notice, dated February 25, 2021. It read, in part:

Description of the proposed or refused action:

The IEP team will move forward with providing Recovery Services to Student in the area of Math. Recovery services will focus on 3 out of 4 math IEP goals that Student demonstrated regression in during the previous IEP cycle (2019-2020) until she has met these goals as written in the IEP. Recovery services will focus on the following IEP goals:

[Recovery service goal 1]: When given fraction calculation problems Student will independently add and subtract fractions with unlike denominators including mixed numbers improving fraction calculation skills from 4/10 opportunities with 40% accuracy to 8/10 opportunities with 80% accuracy as measured by systematic teacher observation and data.

[Recovery service goal 2]: When given whole numbers with decimals up to the thousandths place Student will independently read and write the decimals improving place value awareness from 4/10 opportunities with 40% accuracy to 8/10 opportunities with 80% accuracy as measured by systematic teacher observation and data.

[Recovery service goal 3]: When given 6th grade level multi-step word problems (including but not limited to time, money, and measurement) involving addition, subtraction, multiplication, and division Student will independently write the number sentence and solve improving ability to solve multi-step word problems from 6/10 opportunities with 60% accuracy to 9/10 opportunities with 90% accuracy as measured by systematic teacher observation and data.

...

Any other factors that are relevant to the action:

Plan:

- Assign targeted assignments weekly aligned to 5th Grade IEP goals that were not met in the last IEP cycle (2019-20).
- Designated 20-min per week of one-on-one instruction to support Student's progress on targeted assignments.
- Assess each goal area at least once monthly.
- Monitor progress and adjust plan for recovery services if progress is not being made after the April Assessment period.

...

Plan for Assessment:

- Staggered with...IEP progress report [due dates for remainder of 2020-2021 school year].

3. The District's response included a "Recovery Services Planning and Communication Tool" (recovery plan document) specific to the Student. According to the recovery plan, the Student first began receiving recovery services in March 2021.

The recovery plan document appears to contain a contradiction. For example, one page of it read: "Recovery Service Option: additional supports embedded within the school day: 30 minutes one day a week [to begin in a] remote [setting on] March 3, 2021, [and to continue, with a] progress check on June 11, 2021." Immediately to the right of that text though, the following language appeared: "Designated twenty minutes per week of one-on-one instruction to support Student's progress on targets assignments."¹

In its response, the District stated: "Student started receiving recovery services in March 2021, which consisted of meeting with her IEP case manager remotely for 20-30 minutes every Friday to review assigned work, reteach, and provide specially designed instruction."

4. According to the recovery plan document, on May 18, 2021, the Student's IEP team determined "the Student would continue [to receive] recovery services [during] the summer [of 2021]."

According to the District, the plan for the provision of summer 2021 recovery services was the same as that outlined in the February 25, 2021 prior written notice.

5. On June 15, 2021, the Student's IEP team amended the Student's existing IEP.

In addition to the three recovery service math goals (outlined in the February 25, 2021 prior written notice), the Student's June 2021 amended IEP included three additional math goals: ability to convert fractions to decimals and the ability to convert decimals to fractions; ability to demonstrate improved pre-algebra skills; and, ability to demonstrate "Number, Sense, Operations, and Ratio skills."

¹ In the recovery plan document, this language appeared to come from a snippet of the February 25, 2021 prior written notice.

The June 2021 amended IEP included the following data on the progress the Student made on her recovery service goals between March and June 15, 2021:

- **Recovery service goal 1:** For both the addition and subtraction of fractions with “mixed numbers,” the Student showed 50% accuracy over 4 trials in each area (8 trials total).
- **Recovery service goal 2:** “Goal met: Student was given a series of numbers with decimals places up to the thousandths place and asked to identify the place value of each number part. There were a total of 17 total place values to identify. Student correctly identified 17/17 place values correctly (100% accuracy).”
- **Recovery service goal 3:** “When given 6th grade word problems, Mari answered 7 out of 10 correctly.”

The Student’s June 2021 amended IEP provided the Student with the following, non-concurrent specially designed instruction in a special education setting:

- **Math:** 255 minutes a week (to be provided by special education staff)
- **Math:** 90 minutes a week (to be provided by special education staff)

The June 15, 2021 prior written notice documenting the IEP meeting read, in part:

Student has the option of accessing [specially designed instruction] to support her current and Recovery math goals at a District middle school Summer Educational Program...Student will continue Recovery services until demonstrating that she can meet said goals in 2 consecutive quarters. Once a goal is met in two consecutive quarters, Recovery Services to support that specific goal will be discontinued.

6. The last day of school for the 2020–2021 school year was June 18, 2021.

2021–2022 School Year

7. The District’s first day of school was September 1, 2021.
8. At the start of the 2021–2022 school year, the Student continued to be eligible for special education services under the category of specific learning disability, was in the seventh grade, and attended a District middle school. At that time, the Student’s June 2021 amended IEP was in effect.
9. According to the Parent’s complaint, the Student was entitled to 30 minutes of recovery services each week, to be provided in a 1:1 setting with an instructional assistant, but that these services were not provided between September 1 and September 29, 2021.

In its response, the District stated: “the summer recovery service provider” left the District before or near the start of the 2021–2022 school year; the District was not able to locate a new recovery service provider until September 21, 2021; and, “Student’s weekly in-person 20-minute recovery sessions began on September 29, 2021² and have continued.”

10. In its response, the District stated, in part:

² September 1 through September 29, 2021 represents approximately four weeks of school.

The District acknowledges that Student went approximately 3.5 weeks without receiving the recovery services set forth in her IEP, which consisted of 20 minutes per week of 1:1 instruction and asynchronous work; however, the District maintains that, to the extent this is considered a failure to provide IEP services, such failure was not material...Student received the specially designed instruction in her IEP during that time; it was just the extra recovery services to work on prior goals that were missing for a limited time. Further, Student has continued to make progress on her recovery services goals, specifically meeting two of the goals within a few weeks of services restarting, further undermining the argument that the brief absence of limited recovery services has impacted her ability to progress on her goals. Thus, the District maintains there was no violation.

11. On September 21, 2021, the Parent emailed the Student's special education teacher, stating, in part: she believed the Student required recovery service sessions of at least 30 minutes in length; some of the previously provided recovery service sessions were at least 30 minutes in length; in June 2021, the Student's case manager mentioned that he was open to "changing the amount of time for the check-in"; and, though more data was forthcoming, the Student had recently demonstrated progress on **recovery service goals 2-3**. In this email, the Parent also expressed a desire that the missed sessions (September 1 through September 29, 2021) be made up.

Later that day, the special education teacher responded, stating, in part: "As for the twenty minutes, this was my understanding of what needed to be set up."

Later that day, the Parent responded, stating, in part: "We are requesting [a] 30 minute per week session [for] recovery services [for the] fall quarter...This aligns with recommendations from her last IEP case manager...who agreed that 45 minutes was [a] fine idea and appropriate based on Student's needs."

12. In an email dated September 27, 2021, the special education teacher and a District program supervisor confirmed that providing the Student with weekly asynchronous math assignments was a part of the recovery service plan, as per the February 2021 prior written notice.
13. In separate emails to the special education teacher, dated September 27, October 4 and 7, 2021, the Parent referenced asynchronous recovery service math instruction materials that were recently provided to the Student.
14. In an October 15, 2021 email, the special education teacher informed the Parent "a change [needed to be made] on Student's [recent] assignment for recovery services."
15. The District's response included a progress report related to the Student's three recovery goals, dated mid-to-late October 2021. It read, in part:
[Recovery Service] Goal 1: On October 18, Student was able to accurately solve 4/5 of these types of problems. She has shown mastery, the ability to consistently solve this type of problem on 4/5 samples. When tired, or if she has been doing multiplication and division of fraction problems, she sometimes mixes up the process and quickly fixes the error as soon as she realizes the mistake.

[Recovery Service] Goal 2: Met Goal for Recovery Services (IXL and classroom assignments and teacher observations).

[Recovery Service] Goal 3: Student has been working on steps towards this goal in both general education classes and in 6th period class. The plan was for her to move more into this goal this week. Up until this point, she has been working on single step problems.

16. According to a later email written by the Parent (sent November 15, 2021), "the last 20 minute recovery service direct instruction session took place [on] October 20, 2021."

During this investigation, the District confirmed that October 20, 2021 was the last date on which the Student was provided with a 20-minute recovery service session.

17. November 4, 2021 was the end of the first quarter.

18. During this investigation, the Parent provided OSPI with emails, dated November 9 and 10, 2021, that showed—beginning on or about that date—the Student's recovery service provider was no longer able to serve the Student.

19. On November 15, 2021, the District's student support supervisor emailed the Parent, stating, in part:

I was just made aware that we have been unable to find a staff member...to deliver recovery services to Student, as agreed upon in her IEP. As such, I would like to propose that the District will reimburse you for one hour of tutoring, every other week, with the tutor of your choosing. This reimbursement agreement would extend from the time you agree to the last day of the school year or when Student meets her Recovery Services goals, whichever comes first. We can reconvene to review data in the spring to determine if summer services or additional tutoring will be required for Recovery Services.

According to the District: "The Parent [has] not accepted the District's offer. The Parent instead requested an hour per week, despite the IEP calling for 20 minutes per week. The offer of an hour every other week has been reiterated, and we anticipate this being a topic of conversation at [upcoming] IEP meetings."

According to the Parent: "We did not accept the District's offer [and it is my understanding this matter will be further discussed at IEP meetings scheduled for December 9 and 10, 2021]."

20. January 26, 2022 will be the end of the second quarter.

CONCLUSIONS

Issue 1: Implementation of Recovery Service Determination – The Parent alleged the District did not follow proper procedures for implementing the Student's individualized education program (IEP) team's determination of appropriate recovery services during the 2021–2022 school year.

Recovery services are intended to mitigate the impact of the COVID-19 pandemic and spring 2020 school facility closures and to enable the student to make progress on IEP goals. Recovery services may be used if students have not been provided or were unable to access IEP services during the COVID-19 pandemic. 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 affected school years on the student's overall progress and engagement, including progress toward their IEP goals.

IEP team decisions regarding the provision of services must be materially implemented. When a school district does not perform exactly as called for by the IEP team, the district does not violate the IDEA unless it is shown to have materially failed to implement the student's IEP team's decisions. 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 team.

Here, on February 25, 2021, the IEP team determined the Student required recovery services, with those recovery services to focus on three of the Student's sixth math IEP goals (**recovery service goals 1–3**). The provision of the recovery services was to be composed of two components: (1) "assign[ed], targeted assignments" (asynchronous work); and, (2) "designated...one-on-one instruction."

In relation to the latter category (one-on-one instruction), the documentation was contradictory in terms of what needed to be provided to the Student. For example, the February 25, 2021 prior written notice stated the Student needed to be provided with 20 minutes of one-on-one instruction each week. The recovery plan document though, dated March 2021, stated the Student needed to be provided with 30 minutes of one-on-one instruction each week, and in another part of the document stated the Student needed to be provided with 20 minutes of one-on-one instruction each week. In reality, in the spring of 2021, the Student was provided with anywhere from 20 to 30 minutes of one-on-one recovery services each week—the length of the one-on-one sessions varied slightly each week.

On June 15, 2021, the IEP team determined that the "Student will continue recovery services until demonstrating that Student can meet said goals in 2 consecutive quarters. Once a goal is met in two consecutive quarters, recovery services to support that specific goal will be discontinued."

During the fall of 2021, the Student was only provided with 20 minutes of one-on-one recovery services each week between September 29 and October 20, 2021. This means that between the start of the school year (September 1) and December 10, 2021 (the date this decision was issued, as the failure to provide the agreed upon recovery services is currently ongoing), the Student was not provided with weekly recovery services for approximately 10.5 weeks, meaning the Student was not provided with approximately either 210³ or 315⁴ minutes of recovery services that should have been provided to the Student during this time. Given that the Student was only provided

³ If the Student should have received 20 minutes of one-on-one recovery instruction each week.

⁴ If the Student should have received 30 minutes of one-on-one recovery instruction each week.

three weeks of recovery services out of a possible 13.5 weeks during the period investigated, this represents a material failure to implement an IEP team decision regarding necessary services. Therefore, compensatory services are warranted.

There is no requirement to provide day-for-day compensation for time missed. In determining appropriate compensatory education, it is also important to consider the Student's progress on the Student's goals—despite the implementation failure.

Here, based on the June 2021 amended IEP, it appears that, by the time the IEP was amended, the Student had made progress on **recovery service goals 1 and 3**, and mastered **recovery service goal 2**. Based on the October 2021 progress report, as of that time, the Student continued to show progress in **recovery service goals 1 and 3**⁵, and mastery of **recovery service goal 2**.

On November 15, 2021, the District made the following offer to the Parent: reimbursement for a private tutor, with said tutor to work with the Student for one hour every other week—or—a half hour each week; with the "reimbursement agreement [being in effect] from the time [Parent] agrees to the last day of the school year or when Student meets [the] recovery services goals, whichever comes first." The District made this offer because it was unable to locate a District staff person to provide the recovery services. To date, the Parent has not accepted this offer.

OSPI notes: this appears to be a reasonable way to provide the Student with recovery services moving forward—and a manner in rough conformity with the conditions set forth in the relevant prior written notices: 30 minutes of one-on-one instruction a week until the Student has met **recovery service goals 1–3**.⁶

However, this offer does not address the approximate 210–315 minutes of recovery services that the Student should have been provided with, but was not, between September 1 and December 3, 2021. Accordingly, in relation to the corrective action for this complaint, something additional is warranted. As the Student appears to have made progress on **recovery service goal 1 and 3**, and mastered **recovery service goal 2**, during the relevant period, OSPI determines the following recovery services are an equitable remedy and will be provided to the Student as compensatory education: two hours of recovery services. This figure represents approximately half of those recovery services, which should have been provided to the Student, but which were not, between

⁵ **Recovery service goal 3** related to the Student's ability to solve multi-step word problems. Based on the documentation provided to OSPI during this investigation, it appears this goal was first worked on, from spring 2021 through mid-to-late October 2021, by working with the Student on more fundamental parts of the goal—specifically, single-step word problems. On or about mid-to-late October 2021, the District appears to have begun to work with the Student on multi-step problems.

⁶ OSPI notes the District has a continuing obligation to provide recovery services in conformity with the February and June 2021 prior written notices. And that the District's November 15, 2021 offer appears to be a reasonable way to meet this obligation. To that end, OSPI recommends the District continue to make this offer and encourages the Parent to accept. But absent agreement about reimbursement, the District must continue to provide recovery services as the IEP team agreed to (either via use of District staff or by contracting with a third-party tutor).

September 1 and December 3, 2021. They will be provided in a one-on-one setting—meaning, just the Student and the service provider.

CORRECTIVE ACTIONS

By or before **January 7, 2022** and **February 4, 2022**, the District will provide documentation to OSPI that it has completed the following corrective actions.

STUDENT SPECIFIC:

Compensatory Education

By or before **January 7, 2022**, the District and the Parent will develop a schedule for providing the following compensatory education to the Student: two hours of recovery services, with said services to focus on **recovery service goals 1–3**.

The District will provide OSPI with documentation of the schedule for services by or before **January 7, 2022**.

The compensatory education will occur in a one-on-one setting and be provided by a certificated special education teacher or under the supervision of a certificated special education teacher. The instruction will occur outside of the District's school day and may occur on weekends or during District breaks. Because of the COVID-19 pandemic, the compensatory education may be provided remotely.

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 with at least 24 hours' notice of the absence, the District does not need to reschedule. *The services must be completed no later than **February 4, 2022**, including those needing to be rescheduled.*

No later than **February 4, 2022**, the District shall provide OSPI with documentation that all of the compensatory education has been completed. This documentation must include the dates, times, and length of each session, and state whether any of the sessions were rescheduled by the District or missed by 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 **February 4, 2022**.

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.

RECOMMENDATION

OSPI notes the District has a continuing obligation to provide recovery services in conformity with the February and June 2021 prior written notices. And that the District's November 15, 2021 offer appears to be a reasonable way to meet this obligation.

To that end, OSPI recommends the District continue to make this offer and encourages the Parent to accept. But absent agreement about reimbursement, the District must continue to provide recovery services as the IEP team agreed to, either via use of District staff or by contracting with a third-party tutor.

Dated this ____ day of December, 2021

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.)