

SPECIAL EDUCATION COMMUNITY COMPLAINT (SECC) NO. 22-154

PROCEDURAL HISTORY

On December 19, 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 Snohomish School District (District). The Parent alleged that the District violated the Individuals with Disabilities Education Act (IDEA), or a regulation implementing the IDEA, regarding the Student's education.

On December 20, 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 December 28, 2022, the District requested an extension of time to respond to the complaint. OSPI granted the extension to January 18, 2023.

On January 18, 2023, OSPI received the District's response to the complaint and forwarded it to the Parent the same day. OSPI invited the Parent to reply.

On January 31, 2023, OSPI received the Parent's reply. OSPI forwarded that reply to the District on the same day.

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

SCOPE OF INVESTIGATION

This decision references events that occurred prior to the investigation period, which began on December 20, 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.

ISSUE

1. Whether the District implemented the recovery services the Student's individualized education program (IEP) determined were necessary?

LEGAL STANDARDS

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 individualized education program (IEP) goals, used if students have not been provided or were unable to access IEP services during COVID-19 school facility closures or the pandemic impacted their access to education. 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 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: At the beginning of each school year, each district must have in effect an IEP for every student within its jurisdiction served through enrollment who is eligible to receive special education services. Each school district must ensure that the student's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation. 34 CFR §300.323; WAC 392-172A-03105. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a [student with a disability] and those required by the IEP." *Baker v. Van Duyn*, 502 F.3d 811 (9th Cir. 2007).

FINDINGS OF FACT

Background: Services Spring 2020 – 2020–2021 School Year

1. The Student was eligible for special education services under the category of other health impairment.
2. The Student's December 2019 individualized education program (IEP) included goals and special education services in fine and gross motor (60 minutes per week) and social emotional (60 minutes per week). The Student was supported by a 1:1 paraeducator due to the Student's health needs.
3. In March 2020, the District closed school facilities due to the COVID-19 pandemic and associated Governor's order.
4. Upon return from spring break, beginning April 13, 2020, the District began various forms of online learning, including suggested educational activities.
5. Per the Student's June 2020 progress reports, the Student participated in some remote motor skills sessions, attended Zoom class, and used "Centervention" software to work on social goals. The progress report indicated the Student made sufficient progress on her self-awareness goal and social awareness goal; emerging progress on her gross motor (balance) goal and fine motor (cutting, writing, and drawing) goals; and mastered her gross motor (skipping) goal.
6. In fall 2020, the District opened in a primarily remote learning model, although considered individual students for in-person learning. The District stated that upon review of the Student's file, the special education teacher on special assignment (TOSA) "determined that [the Student] had demonstrated high engagement with remote learning and had made expected

progress on her goals during spring of 2020." The "rubric for determining in-person services" indicated the Student attended "76–100%" of online instruction opportunities.

However, the District stated the Parents requested in-person learning. The Parent stated in her reply that she disagreed with the statement that the Student had high engagement with remote learning, stating instead the Student struggled with remote learning unless she was provided 1:1 instruction. The District, per the Parent's request, included the Student in in-person learning, offering:

- In-person special education instruction two half days per week, including motor therapies;
- Daily remote general education class; and,
- Weekly remote social skills group.

The District stated the Student's paraeducator supported her in-person and remotely. The District stated in its response and documented in a September 29, 2020 prior written notice and teacher/occupational therapist provider logs that:

During this interval the district offered [Student] all of her IEP services...and in fact provided special education support for general education classes well beyond what is offered in her IEP. Her special educator teacher kept a daily log of [Student's] participation and communication with [Student's] mother...The [occupational therapist] also kept a log of all fine and gross motor sessions.

7. On November 18, 2020, a reevaluation of the Student was conducted. The Student continued to be eligible for special education services. In addition to motor skills (fine and gross motor) and social emotional skills, the evaluation report included recommendations that the Student receive specially designed instruction in math, organization, and written expression.
8. On December 7, 2020, the Student's IEP team met and updated the Student's IEP. In the section of the IEP documenting Parent concerns, the Parents noted that the Student struggled with engagement, participation, focus, and attendance in remote/online classes, although the Student did better 1:1 or in a small group. The Parents noted they were concerned about the Student falling behind, not being able to keep up, and in making and keeping friends. The IEP included goals in written expression, math, social emotional, fine motor (writing, drawing, typing, and zipper), gross motor (balance, hopping, and stairs), and organization, with progress reporting at the semester. The IEP included the following specially designed instruction, in the special education setting:
 - Social Emotional: 30 minutes, 2 times weekly
 - Written Expression: 30 minutes, 4 times weekly
 - Math: 30 minutes, 4 times weekly
 - Organization: 5 minutes, 4 times weekly
 - Fine Motor: 20 minutes per week
 - Gross motor: 20 minutes per week

The IEP continued to include 1:1 paraeducator support for 360 minutes per day.

9. A January 31, 2021 progress report noted sufficient progress on most of her goals, described her social emotional progress in her remote social skills group, and documented her

engagement with occupational therapy. For a few goals, the progress report indicated that due to remote learning, the Student did not work on the goal as written but worked on a "related alternative skill."

10. In late February 2021, the District shifted to a hybrid, in-person schedule where they attended two full days of school per week and two days per week of online instruction. The District stated that during this time, the Student received specially designed instruction in-person and on alternated days remotely.
11. A June 2021 progress report showed the Student made sufficient progress in academic and organizational areas, and a mix of emerging and sufficient progress and mastery in motor skills areas. The progress report included an explanation that inconsistent progress on some motor goals was related to seizure activity and absences due to seizures and documented the impact of new medication on some motor goals (e.g., balance and stairs).

2021–2022 School Year

12. At the start of the 2021–2022 school year, the Student continued to be eligible for special education services, attended a District elementary school, and her December 2020 IEP was in effect. The District noted that the District returned to full time, in-person learning in fall 2021.
13. In its response, the District stated it "developed a rubric and process for IEP teams to utilize to determine if students required recovery services due to pandemic related learning losses."
14. In her complaint, the Parent alleged that they were informed the Student would be receiving "in-person Recovery services" starting in January 2022 and that these recovery services were not provided. Then the Parent stated the Student "was supposed to receive [recovery services] in a summer program" and "that did not happen either."
15. On November 9, 2021, the Student's IEP team met to develop the Student's annual IEP.

The team also considered the Student's need for recovery services, documenting the discussion in the "Recovery Services Considerations" form, which documented services provided in spring of 2020 and during the 2020–2021 school year. In its response, the District summarized the form, noting that during the "pandemic-related school changes," the Student received "more than 75% of her IEP services and made expected progress on writing, math, organization, social skills, and motor skills."

The document included that the Student did miss school due to her seizures and could not attend remote classes while recovering from a seizure. The District stated in its response that in written expression and math, the Student made "some progress but not as much as expected", but that these were areas she did not miss specially designed instruction due to pandemic-related changes because the goals were added just two months before return to full-day in-person schooling.

The form also documented that the Parents wanted the Student to receive recovery services in "Occupational Therapy, Written Expression, Social Emotional/Behavior, Organization and Broad Mathematics."

A November 9, 2021 prior written notice¹ documented that the District proposed to provide "recovery services in the areas of Social Emotional/Behavior, Organization, Written Expression, Broad Mathematics and Occupational Therapy," despite that,

The IEP team did not find a lack of appropriate progress on IEP goals that could be attributed to pandemic-related missed, limited or altered IEP services, but parents have indicated that they would like [Student] to receive recovery services in the areas of Social Emotional/Behavior, Organization, Written Expression, Broad Mathematics, and Occupational Therapy.

The notice also indicated the District planned to provide 40 hours of after school recovery services between January and June 2022 and 60 hours during summer 2022, and that the Parents would be contacted in fall 2021 about how to enroll in these programs.

16. On December 8 and 13, 2021, the District sent the Parent a survey related to recovery services. The email indicated the Parent needed to fill out the survey "to indicate how you would like the [recovery] services to be provided" and that this would help with planning at the District level.
17. On February 3, 2022, the District emailed families regarding recovery services. The District stated that they had planned to provide "an after-school option utilizing early release Fridays during winter and spring, and a summer program" and that the District recognized many families had participated in IEP team discussions to establish the need for recovery services. The District stated that due to staffing shortages, it was no longer able to offer the afterschool program but was still planning to offer the summer program. The District also offered an online program as an option instead of in-person services.
18. On May 31, 2022, a District resource support specialist emailed the Parent, stating that the Student would have a 1:1 paraeducator during "Summer Academy" and that there would be a nurse onsite.

The Parent responded, asking whether the Student would receive occupational therapy and whether the Student's "learning [would] be individualized...working on Her goals and areas of academic and social skills needs?"

The specialist responded:

¹ The Parent stated in her reply to the District's response that she did not receive a copy of the complete November 9, 2021 prior written notice included in the District's response. The Parent stated she only received the copy she included in her complaint, which was partially completed and stated, "The district proposes to provide recovery services in the areas of Social Emotional/Behavior, Organization, Written Expression and Broad Mathematics."

She will have recovery services and that is different from Summer Academy. I haven't heard about what Recovery Services will look like, but it is my understanding that she will get instruction to meet her goals from her IEP...Summer Academy is a fun summer experience to be with peers and learn new things.

19. On June 2 and 8, 2022, the District emailed families regarding recovery services and that unfortunately "for a variety of reasons," the District would be "unable to launch such a program this summer." The District stated, "please know that we are strongly committed to providing recovery services for students whose IEP teams have identified a need for them." And the District provided some options for online curriculums/programs and tutoring that students could access, as well as working on a plan for recovery services during the 2022–2023 school year.

In its response, the District stated in its response that, "Throughout spring of 2021, the district sought staff to work a summer recovery services program. Unfortunately, we were not able to hire any teachers or paraeducators for this program."

20. On June 9, 2022, the Parent emailed the specialist and requested an IEP meeting to discuss a plan for recovery services for the Student.
21. On June 14, 2022, the Parent emailed the District's director of special education (director) regarding recovery services. The Parent stated that she was concerned because due the Student's "medical diagnosis and global issues, it becomes more and more difficult for her to catch up." The Parent requested that they "develop a recovery services plan" for the Student.
22. Per a June 24, 2022 email from the director, she and the Parent connected regarding recovery services options. In the email, the director summarized that the choices for recovery services were to wait until the 2022–2023 school year or that they could "embed specially designed (recovery) instruction" into the "Summer Academy" program. The director stated that if "you choose...Summer Academy, we will consider that to be recovery services, but an IEP team meeting can be called in the fall to discuss whether it was sufficient to cover her recovery needs. If the IEP team determines it was not sufficient, more would be added next year."
23. In its response to the complaint, the District stated that a special education teacher assigned to provide extended school year (ESY) services to a few students attending the "Summer Academy" was asked to work with the Student daily on her IEP goals.
24. On June 30, and July 7 and 11, 2022, the Parent emailed the director with questions about what the recovery services would look like.
25. The District provided documentation that the Student attended the summer academy during the period July 25–28, August 1–4, and August 8–11, 2022. The special education teacher working with the Student noted that the Student was "able to transition between activities 50% of the time independently over 5 days"; could "identify a problem and find a solution

50% of the time over 5 days"; and solved "one step addition and subtraction word problems with 44% accuracy over 5 data collection days."

The District noted in its response that the Student was absent the first two days of summer academy, but after that, the special education teacher:

Went into her classroom every day to work with [Student]. [Student] refused to leave the classroom to come to the special education space, so [special education teacher] attempted to work with her in the Summer Academy classroom. Much of the time [Student] refused to interact with her, often turning her head away when [special education teacher] was speaking...[special education teacher] attempted to work with her every day that she was there.

26. On August 8, 2022, the director responded and stated that her understanding was that the Student would "Receive supports in writing [and] math" and there would be a special education teacher coordinating the support. The director stated they did not yet know what recovery services would like next year.
27. The Parent stated in her complaint that when she asked the Student's 1:1 paraeducator "(with 3 days left of the program) how her Recovery Services were going, [the paraeducator] was unaware of Recovery Services and stated that [the Student] was doing the same work as the rest of the class."
28. On August 8, 2022, the Parent emailed the executive director of special services (executive director), stating the Student was attending "Summer Academy with 3 days left" and she "just found out today that she has NOT been receiving Recovery Services as was discussed."
29. In December 2022, the District informed families of a plan to provide recovery services on Friday afternoons, beginning second semester, and the Parents were able to enroll the Student. The District stated that although the Student had already received recovery services, she was given an opportunity to enroll.

The District stated the Parent signed the Student up. And stated that "Plans are in progress for this winter and spring recovery services program and transportation has been set up. We are not facing the same staffing issues as last year and we anticipate the program will run until June, 2023." These recovery services began February 3, 2023.

CONCLUSIONS

Issue: Recovery Services – The Parent alleged that they were informed the Student would be receiving "in-person Recovery services" starting in January 2022 and that these recovery services were not provided. Then the Parent stated the Student "was supposed to receive [recovery services] in a summer program" and "that did not happen either."

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 during COVID-19 school facility

closures or the pandemic impacted their access to education. While districts were encouraged to assess student need for recovery services beginning in the 2020–2021 school year, there was no specific required timeline for providing recovery services. Once a need for recovery services is identified and documented in an IEP or prior written notice, a district must ensure those services are provided.

Here, the Student’s IEP team discussed the Student’s need for recovery services at an IEP meeting on November 9, 2021. The prior written notice documented that although the IEP team did not find lack of appropriate progress on the IEP goals related to the COVID-19 pandemic, the team agreed to provide recovery services in “Occupational Therapy, Written Expression, Social Emotional/Behavior, Organization and Broad Mathematics” per the Parent’s request.² The prior written notice did not include a specific schedule for the recovery services, nor did it specify the amount of services in each area. The notice and other documentation indicated that during the 2021–2022 school year, the District planned to provide school year and summer recovery services programs.

Ultimately, due to staffing shortages, the District was unable to staff and thus offer specific in-person recovery services programs during the 2021–2022 school year or a separate in-person recovery services program during the summer of 2022. For this Student however, following questions and requests from the Parent in late May and June 2022, the District offered and planned for the Student to receive recovery services during the District’s “Summer Academy” program during the summer of 2022. The District noted that a special education teacher was assigned to work with the Student daily on her IEP goals during the summer academy, and in a June 24, 2022 email from the District’s director of special education to the Parent, the director explained that specially designed instruction—recovery services—could be embedded into the summer academy program. The director noted if “you choose...Summer Academy, we will consider that to be recovery services, but an IEP team meeting can be called in the fall to discuss whether it was sufficient to cover her recovery needs. If the IEP team determines it was not sufficient, more would be added next year.”

OSPI finds that while it was unfortunate the District could not execute on its original plan for recovery services program in the 2021–2022 school year and summer of 2022, this is not a violation. OSPI understands the Parent’s frustration with the delay; however, there was no required general timeline by which to provide students with recovery services and the IEP team for this Student did not determine a specific timeline.

² The documentation indicated that the Student participated in remote learning during the school facility shutdowns in spring 2020, and participated in in-person and remote learning on a hybrid schedule during the 2020–2021 school year. During the 2021–2022 school year, the Student attended school in person. At the end of the 2020–2021 school year, the Student had made progress, albeit a mix of emerging skill, sufficient progress, and mastery. Progress reporting did document that the Student’s progress was impacted by seizures, absence due seizures, and changes in medication. The Parent expressed concern that the Student struggled to engage with and focus during remote learning.

And the Student did receive some recovery services in summer 2022. According to the Parent, based on a statement from the Student's 1:1 paraeducator, the Student did not receive recovery services during the summer academy. However, information from the special education teacher indicated the Student did receive some specially designed instruction during the summer session. The special education teacher documented progress data related to some of the instruction, stating: the Student was "able to transition between activities 50% of the time independently over 5 days"; could "identify a problem and find a solution 50% of the time over 5 days"; and solved "one step addition and subtraction word problems with 44% accuracy over 5 data collection days." The teacher did note that engaging the Student in instruction was challenging, the Student was absent the first two days of the summer academy, and after that, the special education teacher explained she:

Went into her classroom every day to work with [Student]. [Student] refused to leave the classroom to come to the special education space, so [special education teacher] attempted to work with her in the Summer Academy classroom. Much of the time [Student] refused to interact with her, often turning her head away when [special education teacher] was speaking...[special education teacher] attempted to work with her every day that she was there.

OSPI finds that the information from the special education teacher is specific and more directly related to the implementation of the IEP than the statement from the paraeducator, who was not providing the Student instruction and based on the IEP, was a support related to the Student's health needs. Thus, OSPI finds that the Student was provided some specially designed instruction as recovery services during the summer of 2022. In addition to what the Student received during the summer of 2022, the District is offering recovery services during the 2022–2023 school year, which started February 3, 2023. The District stated the program was scheduled for Friday afternoons and would run until June 2023, and that the Parent enrolled the Student. Overall, OSPI finds no violation with respect to recovery services for this Student.

CORRECTIVE ACTION

STUDENT SPECIFIC:

None.

DISTRICT SPECIFIC:

None.

RECOMMENDATION

OSPI notes that the District stated in one of its communications to the Parent that "an IEP team meeting can be called in the fall to discuss whether it was sufficient to cover her recovery needs. If the IEP team determines it was not sufficient, more would be added next year." OSPI notes it does not appear an IEP meeting was necessarily needed in the fall or that the Parent requested such a meeting. OSPI also notes that the Student has access to recovery services this spring. Regardless, if the Parent continues to have concerns about the Student's progress, OSPI recommends the IEP team meet and discuss the Student's progress, including any progress made

during recovery services, and consider discussing the impact of the Student's seizures and seizure related absences on progress as needed.

Dated this 13th day of February, 2023

Dr. Tania May
Assistant Superintendent of Special Education
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THIS WRITTEN DECISION CONCLUDES OSPI'S INVESTIGATION OF THIS COMPLAINT

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