

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
SPECIAL EDUCATION DIVISION
Complaint Resolution Report
Case No. 2223-07**

Date issued: October 11, 2022

This complaint was filed with the Special Education Division (SED) of the New Mexico Public Education Department (PED) on August 12, 2022, under the federal Individuals with Disabilities Education Act (IDEA), the implementing Federal Regulations, and State Rules governing publicly funded special education programs for children with disabilities in New Mexico. On behalf of the SED, the undersigned complaint investigator conducted the investigation in the complaint against the PED and issues this report pursuant to 34 C.F.R. § 300.152(a)(5) and 6.31.2.13(H)(5)(b) NMAC.

Conduct of the Complaint Investigation

The independent investigation process in this complaint involved the following:

- Review of the complaint and supporting documentation from complainant;
- Clarification of the issues for investigation with the complainant;
- Review of the PED's response to the allegations, together with documentation submitted by the PED at the request of the independent complaint investigator;
- Review of the complainant's reply to the PED's response to the allegations with supporting documentation;
- Review of the PED's responses to the independent investigator's written questions;
- Review of all district level responses to a series of questions presented by the PED to all school districts at the request of the independent complaint investigator;
- An interview with the complainant;
- Review of the written responses submitted by the complainant on behalf of Organizing Parents Education Network (OPEN) members in response to the independent complaint investigator's follow up questions; and
- Research of U.S. Department of Education, Office of Special Education Programs (OSEP) guidance, PED's guidance, other relevant COVID-19 guidance, and applicable legal authority.

Limits to the Investigation

Federal regulations and state rules limit the investigation of state complaints to violations that occurred not more than one year prior to the date the complaint was received. *34 C.F.R. § 300.153(c); 6.31.2.13(H)(2)(d) NMAC*. However, the independent investigator reviewed relevant information outside of the one year timeframe in order to conduct a thorough investigation. Violations, if any, shall be limited to the one year time period.

Issue for Investigation

The following issues are addressed in this report:

1. Whether PED met its obligation to ensure that all students with disabilities had FAPE available to them upon the resumption of in person learning after COVID-19 school closures pursuant to 34 C.F.R. §§300.17 and 300.101 and 6.31.2.8 NMAC. Specifically, whether PED ensured that school districts considered the need for recovery services for special education students upon return to in-person learning.
2. Whether PED's recovery service guidance to school districts provided parents the opportunity to meaningfully participate in IEP process pursuant to 34 C.F.R. §300.322 by failing to ensure that recovery services were automatically included in IEP team considerations and placing the burden on parents to request the IEP team consider recovery services.

Findings of Fact

1. The complaint was filed on behalf of all special education students under the jurisdiction of PED returning to in person instruction after school closures and/or remote instruction due to the COVID 19 public health emergency. The complaint investigation focused on the actions PED has taken to ensure the appropriate provision of recovery services and opportunities for parents to participate in the decisions regarding recovery services.
2. According to documentation provided by PED, the initial requirement for school closure was issued March 13, 2020, which addressed the closure of schools by the LEAs due to the spread of COVID-19 effective March 16, 2020, pursuant to an Executive Order. The shift to full remote instruction was March 27, 2020. PED adopted a phased approach to reentry with a hybrid model of reopening for the 2020-2021 school year. The full return to in person instruction was April 2021. Local schools had the discretion to close as needed due to local COVID-19 conditions consistent with public health orders.
3. The U.S. Department of Education, Office of Special Education Programs (OSEP) issued several guidance documents regarding COVID-19 school closures, the obligations of state educational agencies (SEAs) for ensuring the provision of special education services and the provision of a free appropriate public education (FAPE), and recovery services after return to in person instruction.

4. Salient portions of OSEP’s guidance relevant to the ongoing provision of FAPE during school closures or remote learning are summarized below:
 - a. March 12, 2020, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*. If a local education agency (LEA) continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.
 - b. March 21, 2020, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*. **To be clear: ensuring compliance with the IDEA should not prevent any school from offering educational programs through distance instruction.** School districts must provide a free and appropriate public education consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. **(Emphasis in original.)**
 - c. September 30, 2021, *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Education Act*. Therefore, the Department repeats and emphasizes that, notwithstanding the challenges associated with the COVID-19 pandemic, families and children retained their rights to receive appropriate services under IDEA. 34 C.F.R. § 300.101.

Under 34 C.F.R. § 300.324(a)(5), to the extent possible, the LEA must encourage the consolidation of reevaluation meetings and other IEP Team meetings for the child. However, this should not be read to discourage an IEP Team from reconvening, if appropriate.

5. Salient portions of OSEP’s guidance relevant to recovery services are summarized below:
 - a. March 12, 2020, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.
 - b. March 16, 2020, *Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students*. The Department understands that there may be exceptional circumstances that could affect how a particular service is provided. If a student does not receive services after an extended period of time, the student’s IEP Team must make an individualized determination whether and to what extent compensatory services are needed consistent with the respective applicable requirements, including to make up for any skills that may have been lost.

- c. March 21, 2020, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*. It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency. As mentioned above, FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students. Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services - IEP teams must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.
- d. September 30, 2021, *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Education Act*. With so many children receiving special education and related services through a variety of modalities during the 2020–2021 school year, it is critically important that the IEP Team also consider any adverse impacts of the COVID-19 pandemic on each child with a disability. This includes a discussion of whether the child may have new or different needs than had been determined prior to the pandemic. Other considerations could include, but are not limited to, revising the IEP to address (1) lost skills or a lack of expected progress toward attaining the child’s annual IEP goals and in the general curriculum at the end of the 2020–2021 school year; (2) updated data (e.g., information gathered from formal and informal assessments, parent input) that reflect the child’s present levels of academic achievement and functional performance following the extended time without face-to-face, in-person special education and related services; (3) all areas of need, whether or not commonly related to the child’s disability category, or if the child may require different or other services to address new areas of need (e.g., behavioral, social, emotional, and mental health needs, needs that arose during the pandemic); and (4) implementing COVID-19 prevention measures such as wearing a face covering/mask or practicing social distancing to provide a safe and healthy school environment and safe participation in the community.

May an IEP Team revise the measurable annual IEP goals to reflect a decline in the child’s knowledge and skills resulting from the disruption in instruction as a result of the COVID-19 pandemic? Yes. When developing, reviewing, and revising the child’s IEP, the IEP Team, which includes the child’s parents, must give “careful consideration of the child’s present levels of achievement, disability, and potential for growth.” **(Emphasis in original.)**

How can the IEP Team use available data about the child to inform decisions about compensatory services? In the absence of controlling Federal or State law, including case law, or specific SEA or LEA guidance, IEP Teams could consider the following factors, among others: (1) the child’s present levels of academic achievement and

functional performance; (2) the child's previous rate of progress toward IEP goals; and (3) documented frequency and duration of special education and related services provided to the child prior to the service disruptions caused by the COVID-19 pandemic.

The child's present levels of academic achievement and functional performance can include concerns raised by parents, the child, and outside service providers, as well as reviewing present levels of performance in light of the anticipated levels of performance without service disruption due to the COVID-19 pandemic.

Previous rates of progress may be determined by considering if the child's progress toward IEP goals has slowed or decreased and projecting if the child's current rate of progress will allow the child to attain their goals.

Frequency and duration of special education and related services may be determined by reviewing the previously agreed upon IEP compared with the actual services provided while the IEP was in effect.

These considerations could guide IEP Team decisions on whether, how, and when the child will access individualized compensatory services, including the time, location, and format of the services needed to achieve the appropriate level of progress. Further, the IEP Team could determine the appropriate timeline for the child to achieve the expected progress toward IEP goals addressed through the provision of compensatory services. **(Emphasis in original.)**

It will be critically important for IEP Teams to make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services. (Emphasis in original.)

To ensure appropriate individualized determinations of the need for, and extent of, compensatory services are made, SEAs can provide guidance to support LEAs and IEP Teams in determining the frequency, location, and duration of services that may be appropriate to address the unique needs of each child with a disability. Any such guidance could assist LEAs and IEP Teams to identify the types of information they may need to assess the impact of service disruptions on individual children and should emphasize the IEP Team's responsibility to make individualized determinations based on the individual facts and circumstances for each child.

- e. January 10, 2022, *Letter to Wolfram and Mandlawitz*. The IEP Team must determine whether the child was denied educational benefit because of the disruption in educational services and whether compensatory education is needed to "make up" for the denial including addressing any skills that have been lost.

One of IDEA's basic tenets is to bring together the parents and school personnel to address the individual needs of each eligible child with a disability through the use of an IEP Team.

Consistent with this, we believe that in situations where compensatory services are necessary to address the impact of service disruptions and limitations on a particular child, school personnel and the child's parent should work together collaboratively to develop a plan for providing such services in a reasonable manner.

6. The PED also issued several guidance documents regarding COVID-19 school closures, the obligations of school district for providing FAPE to children with disabilities and recovery services after return to in person instruction. Portions of the PED's guidance relevant to recovery services are summarized below:

- a. March 13, 2020, *Novel Coronavirus (COVID-19) Updated Guidance for Students with Disabilities*. If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have access to the same educational opportunities, including the provision of FAPE.

After school reopens, the IEP team must make an individualized determination as to whether, and to what extent, it may be necessary to provide compensatory education services that are needed under applicable standards and requirements. The IEP team may consider using assessments to determine whether there have been changes to a student's performance.

- b. March 27, 2020, *Frequently Asked Questions About the Extended Public School Closure*. There is no waiver from IDEA requirements, including IEP and eligibility timelines.

LEAs must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services in the student's IEP.

- c. April 1, 2020, *Frequently Asked Questions (FAQ): Providing a Free Appropriate Public Education through a Distance Learning Platform during a Closure to Normal School Operations due to the Coronavirus (COVID-19) Pandemic 2020*. If a School continues to provide educational opportunities to the general student population during a school closure, then it must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. Schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's Individualized Education Plan (IEP) developed under IDEA.

Once the school reopens, Schools should review all data regarding individual student progress during the period of school closure to determine whether to convene an IEP team meeting to consider compensatory services.

Compensatory services may be necessary when there is a decline in the student's skills or lack of progress that occurred as a result of not receiving services during an extended closure. The IEP team also must review the student's IEP and determine whether any

other changes to the IEP are needed because of the extended absence from school. The IEP team may consider using available assessment information to determine whether there have been changes in a student's performance.

Once normal school operations resume, IEP teams should plan to make individualized determinations regarding whether or not compensatory education services may be needed for a student. Educational need can be measured by assessing whether or not the student continued making progress or maintained skills in the general education curriculum, or alternative course of study specified in their IEP, or toward meeting their individualized IEP goals, and/or if any regression occurred during the period of school closure.

Schools should ensure that the IEP team discussion and decision about compensatory education services are documented in a Prior Written Notice (PWN) that is provided to the parent along with the IDEA Procedural Safeguards Notice.

- d. April 28, 2020, *FAQ Supporting Early Child Special Education Programs (619) during COVID-19 School Closures*. Pursuant to the guidance from the Office for Civil Rights (OCR), if a preschool student does not receive services after an extended period of time, the student's IEP team must make an individualized determination whether and to what extent compensatory services are needed.

Once the school reopens, schools should review all data regarding individual student progress during the period of the closure to determine whether to convene an IEP team meeting to consider compensatory services. IEP teams may need to consider compensatory services when students return to school and IEPs may need to be adjusted accordingly. The IEP team should determine the amount of compensatory special education and/or related services students with IEPs may require, on a case-by-case basis, when normal school operations resume.

- e. June 20, 2020, *Reentry Guidance*. Target Interventions and Supports: Provide additional instructional supports to:
 - i. Students at risk of not graduating on time.
 - ii. Students with disabilities (compensatory services).
 - iii. Students who struggled in the prior distance/remote learning environment.
 - iv. Other students identified as being behind academically by teachers and parents.
- f. June 24, 2020, *School Reentry Guidance & Family FAQs*. Special education services are expected to continue as stated in a student's Individualized Education Plan (IEP). If a school moves to a Remote or Hybrid model, schools are encouraged to allow small groups of students with disabilities to access the school building in order to receive small group or individualized in-person services.
- g. February 2021, *Know Your Rights, A Guide for Families and Parents of Students Receiving Special Education Services*. School districts should convene an IEP meeting

to discuss amendment of the IEP due to pandemic-related changes to your child's services or seek to amend your child's IEP without a meeting.

Will compensatory or recovery education services be provided due to the impact of the pandemic on my child's education? It will be important for any discussions and decisions about whether your child should receive compensatory or recovery education services as a result of the loss, interruption or necessary change in services due to the pandemic (sic). Reach out to your coordinator or school administrator for more details.

- h. Undated *Special Education Services Reentry Guidance*. Compensatory education is a remedy available under the IDEA for a denial of FAPE. Compensatory education services are traditionally awarded when schools have failed to meet their legal obligations.

In contrast, the impact of the school closure on the student's progress due to COVID-19 presents a different challenge because all students in the state were experiencing a different educational program regardless of disability.

Special education under IDEA is centered on the individual strengths and needs of the student with a disability. All decisions related to the special education programming for the student should be driven by data. This means that schools should review data on the student when making a determination about whether the IEP in effect is appropriately written (or needs to be amended/ revised), or if the student may be entitled to compensatory education and/or recovery services. The schools should look at data gathered, prior to the extended school closure, during the period of extended school closure, and during the re-opening of schools. Data may take the form of grades, progress reports, classwork, informal/formal assessments, teacher/related service provider observation(s), parent feedback, and comparison to the progress of all students. The schools are encouraged to work with their instructional specialists and special education teachers to identify assessment tools that will be used for all students as they return to the building. They also need to use tools that more appropriately capture changes over shorter periods of time.

In some circumstances, these data sources will provide the IEP team with enough information to determine the student's current needs. In some circumstances, however, it may be necessary for the student to have an updated formal evaluation that may include formal and informal assessments, observations, etc. The schools should follow standard procedures for obtaining and documenting parent consent to perform these evaluations.

As was shared at the outset of the closure of school buildings, the IDEA does not provide for a waiver of a FAPE during the COVID-19 pandemic.

Important information for the schools to collect and consider, includes:

- Data on the student's progress prior to and during the school closure to assess academic and/or behavioral progress in the general education curriculum and on the student's IEP goal(s). Data may take the form of grades, progress reports, classwork, informal/formal evaluation tools, teacher/service provider observation(s), parent feedback, and comparison to the progress of all students.

- Data on the student’s ability to recuperate skills and make progress on IEP goals upon the return to school.
- Documentation of accommodations and/or services provided (e.g., amount of instruction and services including dates, times, and duration), as well as accommodations and/or services the schools were unable to provide during the extended school closure and re-opening of school.
- Length of school closure (e.g., time without any instruction, time with virtual and/or distance learning, etc.), including information related to the general education curriculum provided to all students and the student’s ability to access virtual and/or distance learning opportunities.

The schools must consider what compensatory education and/or recovery services can be provided to the student. They must be individualized to each student’s needs and designed to remediate the loss of skills. The compensatory education and/or recovery services award will not always reflect the same services (nature, amount, frequency) that were missed. Decisions about the individual student’s compensatory education and/or recovery services award should be made collaboratively with the parent. Identifying compensatory education and/or recovery services will be necessary and may include the scheduling and delivery of services through an extended school day, weekends, and/or summer.

Decisions about compensatory education and/or recovery services should be made as soon as reasonably possible based on the availability of data. As valid data on student performance is necessary to make determinations regarding whether compensatory education and/or recovery services are owed to a student, NMPED/schools recognize that the timing of these determinations may vary. Each school should exercise its discretion in ensuring there is both appropriate data to make thoughtful decisions and no unreasonable delay in serving students.

- i. March 8, 2021, *Ring the Bell, New Mexico!* All schools are expected to make full days of in-person learning available to all students seeking to return to in-person on each school day by no later than April 5, 2021.
- j. April 2021, *Special Education Questions & Answers Regarding Reentry and Recovery Services, Compensatory Education, and Extended School Year Services.* Recovery Services are services that are provided in addition to services and supports identified in an eligible individual’s Individualized Education Program (IEP). They are designed to address educational gaps caused by unexpected service delivery interruptions during the period of school closure and remote instruction. Recovery Services should also be directed at teaching content and skills that were not taught during the period of school closure or remote instruction, as well as the compounding effects of missed instruction and services.

What information should the district/charter gather and consider when determining whether Recovery Services are necessary?

Prior to COVID-19 related school closures:

- The rate of skill acquisition.
- The progress on IEP goals, objectives and benchmarks.
- Observations and data, including attendance data, from teachers, therapists, parents, and others having direct contact with the student.
- Screening, assessment or information maintained on the student, including pretest and post-test data.
- Curriculum-based assessment, including pretest and post-test data; and other relevant factors.

During period of school closures and remote instruction:

- Formal and informal data from student participation in the district/charter instructional activities and offerings, including grades, IEP goals, benchmark assessments, formative assessments, unit assessments, teacher observations, and other relevant factors.
- Samples of the student's work, behavior logs, informal screenings and assessment, and parent input/observations.
- Student's attendance during distance learning.
- Communication and information from parents regarding student participation and performance.

Reentry and return to in-person instruction, if applicable:

- Formal and informal data from the first days, weeks, and months of in-person instruction including grades, IEP goals, benchmark assessments, formative assessments, unit assessments, teacher observations, and other relevant factors, including attendance.
- Samples of the student's work, behavior logs, informal screenings, assessment, and parent input/observations.

COVID recovery services should be unique, individualized to the student, and determined by the IEP Team. IEP teams calculate the effects of lost opportunities for instruction and other services by analyzing the individual student's performance data. The need for and amount of Recovery Services must be determined on a case-by case basis. IEP teams should consider the following:

- Did the student make progress on their IEP goals and objectives prior to and during the period of school closures and remote instruction?

- What were the student’s baseline measures on his or her IEP goals and objectives prior to the period of school closures and remote instruction?
- What accommodations, and services were offered to the student during the period of remote instruction?
- Was the student available during the period of remote instruction for the District/Charter to provide services?
- Did the parent or guardian refuse special education services during the period of school closures and remote instruction? If so, did the District/Charter document the refusal in a prior written notice?
- Were special education services and supports offered during the period of school closures and remote instruction?

Recovery Services may be provided at any time. IEP teams need the flexibility to identify and provide Recovery Services according to the unique needs of the eligible individual. Some students, for example, may respond quickly to initial efforts to accelerate learning, but may plateau within a couple of months and need Recovery Services.

Recovery Services may be provided before or after school, on days the student is not typically in school, or in the summer, as needed by the individual student. It is anticipated that meaningful discussion and identification of Recovery Services will not occur until students have been in school for some time in order to determine whether current IEP services are sufficient for the student to recoup lost skills or regain progress.

7. The PED website houses COVID-19 related guidance in a Parent and Family Portal with resources and information for families, including but not limited to:
 - a. Quarantine Response Hotline;
 - b. Know Your Rights for families of special education students;
 - c. Family Wellness Toolkit;
 - d. School Reentry Resources; and
 - e. Family Engagement Guidance.
8. The Special Education page of the PED website also houses a separate Parent Portal for additional resources helpful to the parents of students with disabilities. Resources include, but are not limited to:
 - a. Know Your Rights: A Guide for Families and Parents of Students Receiving Special Education Services;
 - b. Special Education Early Childhood Evaluation Questions and Answers during COVID-19;
 - c. FAQ Supporting Early Childhood Special Education Programs (619) during School Closures;

- d. Frequently Asked Questions (FAQ): Providing a Free Appropriate Public Education (FAPE) through a Distance Learning Platform during a Closure to Normal School Operations due to the Coronavirus (COVID-19) Pandemic 2020; and
 - e. Office of Special Education and Rehabilitative Services Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Service Children with Disabilities.
9. On January 11, 2022, PED announced the opening of The Office of the Special Education Ombud to assist in advising families of services available to help them navigate the special education system.
10. On July 11, 2022, the Office of the Governor release a Fact Sheet on the Special Education Ombud Act and information on the Special Education Ombud. The attached flyer from the Office of the Special Education Ombud states the following purpose:
- a. "We advocate for public school students and their families."
 - b. "We provide comprehensive support for people navigating the special education system in NM."
11. The Complainant submitted examples of special education recovery service guidance from other states as exemplars for the type of guidance PED should offer. Below is a summary of salient points.
- a. Washington, 2021. The expectation is that IEP teams consider the individual need for recovery services for every student with an IEP from preschool to age 21. Families should not have to make a special request for this process to occur. IEP teams should review the need for recovery services as part of the IEP process. To be clear, it is not required that district immediately schedule and hold IEP meetings for every student with an IEP. Recovery services provide additional special education and related services to students with disabilities and are designed to address lack of appropriate progress on IEP goals, due to missed or limited special education and related services as a result of the pandemic. Although generally recommended that recovery services be provided outside of the school day, the IEP team could determine, based on the needs of a student, that recovery services be provided during the school day. Decisions regarding recovery services start with an inquiry about present levels pre-pandemic and post return to school.
 - b. Connecticut, May 24, 2021. Special education recovery is not intended as a minute-for-minute replacement for disrupted instructional time, but rather aims to make time-limited adjustments to the student's IEP to address lack of expected progress, mastery of essential skills, and prevention of further regression. Not all students with IEPs will require special education recovery. The IEP team must determine whether the student requires special education recovery by looking at the student's previous present levels of academic achievement and functional performance with the student's current present levels. The guidance provides specific detail on the team's discussion and consideration.
 - c. Oregon, January 4, 2022. Whether and to what extent a student needs individualized COVID-19 recovery services is a determination made for each student experiencing

disability based on the student's unique circumstances. The guidance is intended to assist IEP teams in making critical decisions about individualized COVID-19 recovery services. As with other special education services, individualized COVID-19 recovery services should be determined by the IEP team while looking at the totality of the circumstances for each student. Parent information and concerns must be considered, as is typical within the IEP process. Any member of the IEP team, including parents and eligible students, may request that the IEP team meet to review the need for individualized recovery services. IEP teams are not required to meet more than once annually to consider the need for individualized recovery services.

12. A national organization for parent attorneys in special education, the Council of Parent Attorneys and Advocates (COPAA) issued guidance 2020 on Compensatory Education in the time of COVID-19. Relevant excerpts are summarized below.
 - a. When school reconvenes, the child's IEP team will need to meet and determine present levels of performance as a prerequisite to designing a program and placement. Parents should have a significant voice in setting the current level of performance. If the student's performance is below where it was on the day schools closed for the COVID-19 pandemic, the IEP team will be obliged to provide more intense services than those provided in the prior IEP.

Not every student will need remedial services. Some students will progress appropriately in the at-home program. Others will experience significant regression. In each case, the IEP team must, after the closure ends, closely examine the student's progress and regression, craft accurate present levels of performance, and provide services based on the needs established by the data.

13. As part of this investigation and at the request of the investigator, PED provided each school district with four questions to audit the approach to recovery service determinations across the state during the 2021-2022 school year, which is the period of time relevant to this investigation. Most LEAs had returned to in-person instruction. Several LEAs indicated that there was no interruption in instruction during the 2021-2022 school year. The questions and a sample of the responses received are summarized below:
 - a. Describe the process the LEA used for IEP team consideration of COVID-19 recovery services during the 2021-2022 school year.
 - i. Recovery services were determined in the IEP process and provided during the summer.
 - ii. IEPs were not adjusted, there were no recovery services needed.
 - iii. School Teams utilized data that was gathered from short cycle assessment, IEP meetings, parent conferences and other means to consider the need for compensatory/recovery services to mitigate potential learning loss.
 - iv. IEP Team had three options to provide recovery: Special Education Summer Recovery Institute (held for 4 weeks summer of 2021), and changes to IEP to include IEP service type, service minutes, location, goal changes, and/or

accommodations. These options would be chosen based on IEP Team data review and decision.

- v. Students who were recorded on benchmark testing as being below grade level and/or not making expected growth, or in credit recovery they were enrolled in two different summer school options (some in both).
- vi. For recovery services in academics, the IEP team considered grades, short cycle assessment scores and classroom teachers observations as part of the process of determining if the student needed something more specific than the recovery academics provided by the general ed classroom teacher.
- vii. Annual IEPs were held to address additional services needed for academic deficiencies caused by the COVID-19 pandemic restrictions.
- viii. Communication was prioritized. Mentors communicated with students/families weekly to discuss needs and progress.
- ix. Individualized data gathered BOY 2021-2022 through assessments and compared to MOY 2020 data; Also, triangulated data from parents, teachers, therapists as to how students were functioning upon return to in person learning in 2021-2022.
- x. We provided one-on-one and one-to-two after school tutoring every day for an hour.
- xi. School teams "staffed" individual cases with specific focus on students with moderate to severe disabilities receiving consideration for "recovery services."
- xii. Our IEP teams worked to gather information for a student that was relevant of their performance during remote learning and compared this to pre-COVID 19 performance.
- xiii. The district considered several factors that included: 1) attendance, 2) access to the internet based on need, 3) parent interviews, 4) teacher reports and interviews, 5) district assessments, and 6) school records and recent evaluation reports.
- xiv. Recovery service discussion was part of each IEP meeting.
- xv. Upon conducting IEP meetings following the return of students after covid, IEP teams considered the need for recovery services by reviewing the following data: services provided during covid to the student, progress information during the time of covid, grades during covid and any short cycle or evaluation data completed upon the student returning to school following the school closure. The IEP team then determined, as a team, if recovery services were required and if so what the services would look like.
- xvi. IEP Team based needs on individual cases and used data gained on initial short-cycle assessments (I-Station, STAR) and in-class assessments to determine gains made during COVID and how far behind students on an IEP were compared to the regular education class.

- xvii. IEP meetings were held at the start of the 21-22 SY. These IEPs were primarily held to address loss of learning and offering parents with students in the district services to make up for loss of learning.
- xviii. In IEP team meetings the option for additional services and/or the possibility of extended school year were discussed by IEP team based on needs of the individual student.
- xix. The team considered the following questions.
 - 1. Did the disruption in service impact the students ability to access their program. If yes what is the plan to address.
 - 2. Does the team feel that recovery services are needed. If so what services were impacted and what is the plan to address.
 - 3. Does the team suspect any new areas of concern, if so do evaluations need to be conducted.
- xx. All team members of the IEP meetings were involved.
- xxi. IEP teams were told to consider the following:

Did the student make progress on their IEP goals and objectives prior to and during the period of school closures and remote instruction? What were the student's baseline measures on his or her IEP goals and objectives prior to the period of school closures and remote instruction? What accommodations, and services were offered to the student during the period of remote instruction? Was the student available during the period of remote instruction for the District/Charter to provide services? Did the parent or guardian refuse special education services during the period of school closures and remote instruction? If so, did the District/Charter document the refusal in a prior written notice? Were special education services and supports offered during the period of school closures and remote instruction?
- xxii. IEP teams reviewed PLAAFP, progress on goals and objectives and determined the need for services, students not making progress were recommended for recovery services. IEP teams reviewed pre and post progress after pandemic and specifically looked for regression recoupment. IEP team review of students' academic and functional progress pre and post school closure. Students whose teams identified as needing services were recommended for recovery services.
- xxiii. When considering the need for COVID-19 recovery services during the 2021-2022 school year, IEP teams (1) compared the student's performance levels prior to the closure, during the closure, and upon return to in-person instruction, (2) the student's rate of progress in meeting past and current IEP goals, and (3) if needed, whether recovery services would be provided as increased service time during the school day or after-school services.

- b. Describe the manner in which COVID-19 recovery services were documented in the IEP for individual students.
- i. If it was determined a student required compensatory services, the services should be clearly labeled as such in the student's IEP.
 - ii. Recovery services were not needed.
 - iii. The need for recovery services, credit recovery services, ELTP etc. were identified in the Service Section of the Prior Written Notice and service logs requested from ancillary providers.
 - iv. Documented in Addendum PWN in student's file. Changes to IEP to include IEP service type, service minutes, location, goal changes, and/or accommodations: Documented as needed based on changes in Service Page, PWN, Accommodation/Modification Page, and/or Goal Pages.
 - v. There was a statement on the PWN.
 - vi. If a student was found to be needing recovery services before or at the time of their IEP, it was documented in the PWN.
 - vii. The services were documented in the prior written notice, and IEP schedule of services.
 - viii. Recovery services were documented through the Prior Written Notices and schedule of services. An addendum was added to all IEP's at the beginning of the Pandemic, to explain Pandemic support services and compensatory services. Also, every IEP included a COVID-19 statement explaining compensatory services and how the school would address student needs.
 - ix. Recovery services were documented in various ways that included documentation in the PWN; documentation in Addendums or in Annual IEP reviews.
 - x. Documented in the IEP.
 - xi. Recovery services were documented in the Prior Written Notice.
 - xii. If a student was in need of services that seemed to stem from COVID- 19 impact, the IEP team would work to implement services for a duration with the intention of re- examining these services after a set time and as specified on the IEP.
 - xiii. As a district, we determined that this past summer session that all students with an IEP would qualify for ESY. The district also extended ESY for all students with an IEP for the entire summer. This was offered to all families. All related services were offered the entire summer as well. This offer was extended to our PreK program as well. Lastly we provided bus services curb to curb for our PreK students. This was documented in the IEP.
 - xiv. Services were documented in the IEP.
 - xv. In the IEP under extra needs.

- xvi. The determination of recovery services due to covid 19 and the services, if required, were documented in the Prior Written Notice of the student's IEP.
 - xvii. Present academic levels, assessment scores, and academic strengths and weaknesses were all documented in depth. Plans were put in place to target individual areas of need that were agreed upon by the IEP Team. Progress was documented and communicated quarterly.
 - xviii. Recovery services were document via IEP addendums.
 - xix. Based on IEP team decisions, if there was a need for additional services would reflect in the IEP schedule of services and prior written notice.
 - xx. Statements were written in the PWNs of each IEP.
 - xxi. Recovery services were documented through Prior Written Notice.
 - xxii. Documented recovery services in PWN if needed.
 - xxiii. The need for services determined by IEP team through present levels were documented in the prior written notice.
 - xxiv. Recovery services were documented in the PWN.
- c. Provide the number of students for which COVID-19 recovery services were provided, and
- d. Provide the total number of IDEA eligible students with disabilities served by the LEA with IEPs during the 2021-2022 school year. (Combined responses)
- i. Varied numbers by school site out of 483 eligible students.
 - ii. 0 out of 494 eligible students.
 - iii. 25 out of 206 eligible students.
 - iv. 91 students + those that had adjustment to their IEPs out of 2557 eligible students.
 - v. 20 out of 43 eligible students.
 - vi. 10 out of 24 eligible students.
 - vii. 60 out of 60 eligible students.
 - viii. 55 out of 55 eligible students.
 - ix. 12 out of 204 eligible students.
 - x. 30 out of 64 eligible students.
 - xi. 60-65 out of 450 eligible students.
 - xii. 17 out of 17 eligible students.
 - xiii. 167 out of 167 eligible students.
 - xiv. 100 out of 100 eligible students.
 - xv. 0 of 217 eligible students.

- xvi. 31 out of 31 eligible students.
- xvii. 16 out of 363 eligible students.
- xviii. 10 out of 10 eligible students.
- xix. 26 out of 256 eligible students.
- xx. 146 offered, 5 accepted out of 146 students.
- xxi. 0 out of 1409 eligible students.
- xxii. 10 out of 3955 eligible students.
- xxiii. 70 out of 2135 eligible students.

14. The Complainant, on behalf of OPEN, responded to questions from the investigator. The responses are summarized as follows:

PED did not create any structure to ensure that LEAs considered the need for recovery services for each student with a disability, or any structure for metrics or guideposts as to how to measure the impact of COVID, remove learning, and the need for recovery services.

PED just took the federal money and is apparently not accountable to anyone about how recovery services were available and delivered in New Mexico.

PED just did nothing, which means that students get nothing. New Mexico's failure to tackle development of a system for recovery services resulted in a denial of FAPE.

As to whether recovery services should be delivered outside of the regular school day, it needs to be an individualized decision, not one size fits all.

PED has previously said that recovery services would be determined by a student's IEP team. This could have been through an IEP amendment and would not need to be a new IEP.

There was no form or specific directive from PED requiring that IEP teams analyze the need for recovery services, giving LEAs some guidance on what should be looked at.

PED got all the federal dollars to provide for education and services to make up for COVID years, but PED did not use that money for recovery services for students with disabilities, as there was never any plan or steps to ensure that LEAs considered needs for recovery services or delivered recovery services. This is a typical pattern by PED, there is no follow through to ensure FAPE, just abstract announcements.

15. The Complainant also provided a copy of a July 27, 2022 presentation from the Best Practices Clearinghouse, "Lessons from the Field," presented in part by Valerie C. Williams, Director, Office of Special Education Programs in the U.S. Department of Education. The following information is relevant to this investigation:

- a. When considering recovery services, the team should consider the individual needs of the child, whether the child received appropriate services, how additional services may support the child to make progress, and the impact of the pandemic on each child asking if the child had different needs before and during the pandemic.

- b. The team may look at lost skills or lack of expected progress toward IEP goals, updated data that reflect the child's present levels of performance, all areas of need, including new or different needs, and previous rates of progress and the frequency and duration of special education and related services provided prior to the pandemic.
16. OSEP reiterated in several guidance documents that if a parent disagrees with the IEP team's decision regarding compensatory services, the parent has a right to use IDEA's dispute resolution procedures, as with any other IEP team decision or proposal. *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Education Act* (September 30, 2021).
17. PED provided copies of two Special Education Division Complaint Resolution Reports finding districts in violation for a denial of FAPE over services lost and lack of progress during the pandemic. These reports are publicly available on PED's website in the dispute resolution section.

Conclusions of Law

1. The overarching purpose of the IDEA is to ensure that students with a disability have FAPE available to them and to ensure that the rights of children with disabilities and their parents are protected. *34 C.F.R. §300.1.*
2. Under the IDEA, parents are afforded a series of safeguards to protect their opportunity to participate in the special education process for their child. *34 C.F.R. §300.504.* The failure to provide for meaningful participation by parents in the IEP process may result in a denial of FAPE. *Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004).
3. Parents have the right to participate in the IEP process, where IEP teams review data and make decisions about a student's present levels of academic achievement and functional performance, identification of educational needs, the development of measurable annual goals, and the services and supports necessary to meet those goals. *34 C.F.R. §300.321 and 34 C.F.R. §§300.320 through 300.324.*
4. PED, as the State Educational Agency (SEA), is responsible for general supervision of all educational programs for children with disabilities administered within the state. PED must ensure that the requirements of IDEA and the federal regulations are met. To that end, PED must have in effect policies and procedures in fulfillment its general supervisory responsibility. *34 C.F.R. §300.149.*
5. The initial requirement for school closure was issued March 13, 2020, which addressed the closure of schools by the LEAs due to the spread of COVID-19 effective March 16, 2020, pursuant to an Executive Order. The shift to full remote instruction was March 27, 2020. PED adopted a phased approach to reentry with a hybrid model of reopening for the 2020-2021 school year. The full return to in person instruction was April 2021.
6. During the time of the COVID-19 pandemic and its aftermath, eligible students with disabilities were still entitled to FAPE, and the SEAs in each state had to ensure the

implementation of services and supports in order to provide FAPE. The determination of how FAPE was to be provided may have been different in this time of unprecedented national emergency. *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020); *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020) (School districts must provide a free and appropriate public education consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students.); and *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Education Act* (September 30, 2021) (Therefore, the Department repeats and emphasizes that, notwithstanding the challenges associated with the COVID-19 pandemic, families and children retained their rights to receive appropriate services under IDEA. 34 C.F.R. § 300.101.).

7. Some students with disabilities who experienced a service or learning loss associated with the pandemic may be entitled to recovery services or compensatory services. “Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services - IEP teams must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.” *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020).
8. OSEP encouraged SEAs to develop guidance to assist districts with the development of recovery service plans.

To ensure appropriate individualized determinations of the need for, and extent of, compensatory services are made, **SEAs can provide guidance** to support LEAs and IEP Teams in determining the frequency, location, and duration of services that may be appropriate to address the unique needs of each child with a disability. **Any such guidance could assist LEAs and IEP Teams to identify the types of information they may need to assess the impact of service disruptions on individual children and should emphasize the IEP Team’s responsibility to make individualized determinations based on the individual facts and circumstances for each child. (Emphasis added.)**

Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Education Act (September 30, 2021).

9. PED issued a series of guidance documents commencing in March 2020 and continuing throughout the duration of the pandemic. The guidance, which remains available on PED’s website, stressed the importance of individualized decision making within the framework of the IEP process to ascertain a student’s need for recovery services.

Once the school reopens, Schools should review all data regarding individual student progress during the period of school closure to determine whether to convene an IEP team meeting to consider compensatory services. Compensatory services may be necessary when there is a decline in the student's skills or lack of progress that occurred as a result of not receiving services during an extended closure. The IEP team also must review the student's IEP and determine whether any other changes to the IEP are needed because of the extended absence from school. The IEP team may consider using available assessment information to determine whether there have been changes in a student's performance.

Frequently Asked Questions (FAQ): Providing a Free Appropriate Public Education through a Distance Learning Platform during a Closure to Normal School Operations due to the Coronavirus (COVID-19) Pandemic 2020 (April 1, 2020).

10. PED specifically advised districts on how to make a determination regarding recovery services, stating:

All decisions related to the special education programming for the student should be driven by data. This means that schools should review data on the student when making a determination about whether the IEP in effect is appropriately written (or needs to be amended/ revised), or if the student may be entitled to compensatory education and/or recovery services. The schools should look at data gathered, prior to the extended school closure, during the period of extended school closure, and during the re- opening of schools. Data may take the form of grades, progress reports, classwork, informal/formal assessments, teacher/related service provider observation(s), parent feedback, and comparison to the progress of all students. The schools are encouraged to work with their instructional specialists and special education teachers to identify assessment tools that will be used for all students as they return to the building. They also need to use tools that more appropriately capture changes over shorter periods of time.

Important information for the schools to collect and consider, includes:

- Data on the student's progress prior to and during the school closure to assess academic and/or behavioral progress in the general education curriculum and on the student's IEP goal(s). Data may take the form of grades, progress reports, classwork, informal/formal evaluation tools, teacher/service provider observation(s), parent feedback, and comparison to the progress of all students.
- Data on the student's ability to recuperate skills and make progress on IEP goals upon the return to school.
- Documentation of accommodations and/or services provided (e.g., amount of instruction and services including dates, times, and duration), as well as accommodations and/or services the schools were unable to provide during the extended school closure and re-opening of school.
- Length of school closure (e.g., time without any instruction, time with virtual and/or distance learning, etc.), including information related to the

general education curriculum provided to all students and the student's ability to access virtual and/or distance learning opportunities.

Special Education Services Reentry Guidance (undated).

11. April 2021 PED guidance reiterated important factors for IEP teams to consider and added the following considerations and questions for IEP teams:

Important information for the schools to collect and consider, includes:

Data on the student's progress prior to and during the school closure to assess academic and/or behavioral progress in the general education curriculum and on the student's IEP goal(s). Data may take the form of grades, progress reports, classwork, informal/formal evaluation tools, teacher/service provider observation(s), parent feedback, and comparison to the progress of all students.

Data on the student's ability to recuperate skills and make progress on IEP goals upon the return to school.

Documentation of accommodations and/or services provided (e.g., amount of instruction and services including dates, times, and duration), as well as accommodations and/or services the schools were unable to provide during the extended school closure and re-opening of school.

Length of school closure (e.g., time without any instruction, time with virtual and/or distance learning, etc.), including information related to the general education curriculum provided to all students and the student's ability to access virtual and/or distance learning opportunities.

IEP teams should consider the following:

- Did the student make progress on their IEP goals and objectives prior to and during the period of school closures and remote instruction?
- What were the student's baseline measures on his or her IEP goals and objectives prior to the period of school closures and remote instruction?
- What accommodations, and services were offered to the student during the period of remote instruction?
- Was the student available during the period of remote instruction for the District/Charter to provide services?
- Did the parent or guardian refuse special education services during the period of school closures and remote instruction? If so, did the District/Charter document the refusal in a prior written notice?
- Were special education services and supports offered during the period of school closures and remote instruction?

Special Education Questions & Answers Regarding Reentry and Recovery Services, Compensatory Education, and Extended School Year Services (April 2021).

12. The guidance issued by PED throughout the period of time affected by the pandemic is substantially similar to OSEP's guidance, the guidance of other states as submitted by the

Complainant, and the guidance of COPAA, a national advocacy organization. In essence, both the federal and state level guidance describe a team driven process utilizing data to make individualized decisions regarding the need for recovery services on a case by case basis. It is an IEP team function, which incorporates a team review of a child's current levels of academic achievement and functional performance as well as progress toward achieving measurable annual goals.

13. As can be ascertained by the summary of responses to questions posed by the investigator, not all districts have a common understanding of the purpose of recovery services or the responsibility to provide recovery services for students whose learning was negatively impacted by the pandemic. However, this complaint was filed against PED alleging violations of PED's general supervisory obligation and the resulting denial of parental participation caused by PED. The operative question in this complaint focuses on the adequacy of PED's actions, NOT whether every school district complied with PED's guidance and the IDEA. As with any other IDEA requirement, districts and LEAs have an independent obligation to be in compliance, and the SEA has the independent obligation to have policies, procedures, and practices in place to ensure compliance. If a district has not complied with all aspects of the IDEA, there is no legal assumption that the SEA failed in its general supervisory responsibility. Individual instances of noncompliance may result in corrective action against the offending district as directed by the SEA.
14. In addition to filing state complaints against a system, parents retain the right to file a state complaint when they disagree with a team decision regarding recovery services for their child. *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Education Act* (September 30, 2021). The state complaint system delineated in 34 C.F.R. §§300.151 through 300.153 is a component of a state's system of general supervision under the heading in the federal regulations, "SEA Responsibility for General Supervision and Implementation of Procedural Safeguards." PED provided copies of two student specific complaints filed as a result of a disagreement over recovery services. PED exercised its general supervisory responsibility in investigating those complaints consistent with the federal regulations.
15. The level of specificity requested by the Complainant in PED's development and enforcement of pandemic related guidance is not required by the IDEA or state law. PED met its obligation to implement guidance to assist districts and LEAs with the appropriate considerations for recovery services. PED reiterated that decisions regarding recovery services are made by the team, including the parent, on an individualized basis. There is no evidence to support that the actions of PED resulted in an exclusion of the parent from the decision making process.

Decision

Whether PED met its obligation to ensure that all students with disabilities had FAPE available to them upon the resumption of in person learning after COVID school closures pursuant to 34 C.F.R. §§300.17 and 300.101 and 6.31.2.8 NMAC. Specifically, whether PED ensured that school

districts considered the need for recovery services for special education students upon return to in-person learning.

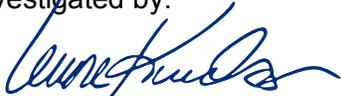
No violation. PED met its general supervisory obligation with respect to recovery services.

Whether PED's recovery service guidance to school districts provided parents the opportunity to meaningfully participate in IEP process pursuant to 34 C.F.R. §300.322 by failing to ensure that recovery services were automatically included in IEP team considerations and placing the burden on parents to request the IEP team consider recovery services.

No violation. Parents had the opportunity to participate in the IEP team process where recovery service decisions were made.

This report constitutes the New Mexico Public Education Department's final decision regarding this complaint.

Investigated by:



Lenore Knudtson
PED appointed complaint investigator