

**NEW JERSEY DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION PROGRAMS
COMPLAINT FORM**

*Date: May 26, 2021

To: **Dominic Rota, Director**
Office of Special Education Policy and Dispute Resolution
NJ Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

Beginning December 17, 2018, the Office of Special Education Policy and Dispute Resolution (SPDR) will electronically accept requests for special-education complaint investigations using an SPDR-maintained and monitored email address. The newly created email address will be used exclusively for the submission of requests for special-education complaint investigations, and will not be used to communicate with the parties or their representatives. Completed requests for complaint investigations must be saved as [Adobe](#) PDF documents and emailed to specialeducationcomplaints@doe.nj.gov.

*Relationship to Student(s): (Check One)

☐ Parent/Guardian ☒ Attorney ☐ Advocate ☐ Other: _____

Name: Elizabeth Athos, Esq.

Address: Education Law Center, 60 Park Place, Suite 300, Newark, NJ 07102

(In the case of a homeless child please provide available contact information)

Phone: (973) 624-1815 ext. 20 Fax: (973) 624-7339 Email address: eathos@edlawcenter.org

Provide the name of the student or specify the group of students affected by the alleged violation(s):

Students with disabilities throughout New Jersey, including the students who are the subject of each complaint investigation request referenced in the Attachment to this request.

School where the alleged violation(s) occurred: all NJ schools affected

*District: all districts affected *County: all counties affected

The alleged violation has been committed by the State Educational Agency – New Jersey Department of Education, including through its Office of Special Education Policy and Dispute Resolution (SPDR).

*1. Please check which statement applies:

* Items marked with an asterisk are not required; however, providing the requested information will assist in expediting your request.

☐ I am currently involved in, or have recently requested, a due process hearing. I have enclosed a copy of the request.
☐ I am considering filing for a due process hearing. I will send a copy of the request.
☒ I am not planning on filing for a due process hearing.

Note: Any issues contained in a request for a complaint investigation that are also the subject of a due process hearing will be set aside until the conclusion of the hearing. If the Administrative Law Judge makes a ruling on the issue(s), that ruling is binding.

*2. Briefly state the specific violation(s) of **special education law or regulation** that you believe occurred. If you choose to attach additional information or documentation, **you must nevertheless summarize the alleged violations**, as you see them.

The violations and legal authority relied on are summarized below. **Attached please find an expanded statement of each of the four specific violations alleged.**

- I. The policy and practice of the New Jersey Department of Education (NJDOE) and its Office of Special Education Policy and Dispute Resolution (SPDR) for implementing compensatory education violates federal and state requirements as well as United States Supreme Court and longstanding Third Circuit Court of Appeals' precedent. Specifically, in the March 3, 2021 "Guidance Regarding Compensatory Education Determinations for Students with Disabilities as a Result of COVID-19": 1) NJDOE and SPDR fail to tell schools that the failure to provide the special education and related services set out in a student's IEP, by definition, deprives the student of a free appropriate public education (FAPE), entitling the student to compensatory services; and 2) NJDOE and SPDR erroneously tell schools that a 1:1 ratio is not required when calculating the amount of compensatory services. Further, NJDOE and SPDR have implemented their illegal compensatory education policy in their response to parental complaints, explicitly and improperly telling school districts in their complaint investigation reports that districts are not required to provide compensatory services on one-to-one basis for minutes/hours/days of instruction that were not provided in accordance with the students' IEPs.
- II. NJDOE and SPDR violated Third Circuit Court of Appeals' precedent by telling school districts in Complaint Investigation Reports and in The Road Back (June 2020) to use regression without recoupment in a reasonable time as the standard for determining whether a student is entitled to compensatory education.

- III. In considering compensatory education claims, NJDOE and SPDR did not review all relevant information and make an independent determination as to whether districts provided special education and related services for the frequency and duration set out in the students' IEPs or complied with state requirements regarding the length of a school day or for active and direct instruction.
- IV. Despite finding that districts violated IDEA by not fully implementing a child's IEP, including providing no educational services to the child for specified periods of time, NJDOE and SPDR did not take corrective action directing districts to provide a specific amount of compensatory services or monetary reimbursement to the students. Instead, in violation of their own obligations under IDEA, NJDOE and SPDR only told districts to "consider" whether to provide compensatory services or to "assess" or "determine the need" for compensatory services.

The statutes and regulations violated by NJDOE and SPDR with regard to these issues include the following:

- 20 U.S.C. Sec. 1401(9); 20 U.S.C. Sec. 1412(a)(1)(A); 20 U.S.C. Sec. 1412(a)(11); 20 U.S.C. Sec. 1413(a)(1); 20 U.S.C. Sec. 1415(i)(2)(C)(iii); 34 CFR 300.17; 34 CFR 300.108(a); 34 CFR 300.110; 34 CFR 300.114(a); 34 CFR 300.151(b)(1) and (2); 34 CFR 300.152(a)(4) and (b)(2); 34 CFR 300.320; 34 CFR 300.516(c)(3); N.J.A.C. 6A:14-1.1(b)(1), (7) and (9); N.J.A.C. 6A:14-1.1(d)5; N.J.A.C. 6A:14-1.2(b)(1) and (2); N.J.A.C. 6A:14-3.7(e)8; N.J.A.C. 6A:14-3.9(a); N.J.A.C. 6A:14-4.1(a); N.J.A.C. 6A:14-9.1; N.J.A.C. 6A:14-9.2(e) to (g); N.J.A.C. 6A:32-8.3(a), (b) and (e).

Relevant federal and state Guidance include:

- Guidance Regarding Requirements for Public Health-Related School Closure, NJDOE (March 5, 2020)
<http://state.nj.us/education/broadcasts/2020/mar/05/Guidance%20Regarding%20Requirements%20for%20Public%20Health-Related%20School%20Closure.pdf>
- New Jersey Specific Guidance for Schools & Districts (Updated April 13, 2020)
<https://www.nj.gov/education/covid19/sped/guidance.shtml>
- Restart and Recovery Plan for Education: The Road Back, NJDOE (June 2020)
<https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf>
- Clarifying Expectations Regarding Fulltime Remote Learning Options for Families in 2020-2021, NJDOE (July 24, 2020)

<https://nj.gov/education/reopening/updates/docs/7.24.20%20RtR%20Fulltime%20Remote%20Update.pdf>

- Guidance Regarding Compensatory Education Determinations for Students with Disabilities as a Result of COVID-19, NJDOE (March 3, 2021)
<https://www.nj.gov/education/broadcasts/2021/mar/GuidanceforDeterminingCompensatoryEducationforStudentswithDisabilities.pdf>

Relevant New Jersey Executive Orders include the following:

- Executive Order 104 (March 16, 2020)
<https://nj.gov/infobank/eo/056murphy/pdf/EO-104.pdf>
- Executive Order 175 (August 13, 2020)
<https://nj.gov/infobank/eo/056murphy/pdf/EO-175.pdf>

3. Specify the period of time or dates when the alleged violation(s) occurred. June 12, 2020 through the present.

Note: The complainant must allege a violation that occurred not more than one year prior to the date that the complaint is received.

*4. Is/Are the alleged violation(s) continuing at present? x Yes No

5. **State the relevant facts**, including any claim that the district has failed to provide services required by the IEP of a student with disabilities. If you are claiming that the district has failed to implement the IEP, *please include a copy of the entire IEP*. (Attach additional pages, if necessary. If you have other written documentation from the school that you believe would assist in verifying the violation, please submit them with this request).

The facts relevant to each of the four alleged violations are set forth in the Attachment.

6. Please describe how the issue(s) could be resolved. Attach additional pages as necessary.

As noted in comments to IDEA's federal regulations, the SEA is obligated to "resolve any complaint against the SEA pursuant to the SEA's adopted State complaint procedures." United States Department of Education, 71 Federal Register 46540, 46602 (Aug. 14, 2006) (Comments to 34 C.F.R. Parts 300 & 301). In so doing, the SEA may "use an outside party" to resolve the complaint and we ask that SPDR do so for this complaint. Id.

The above issues can be resolved if NJDOE and SPDR issue directives to relevant SEA and Local Educational Agency (LEA) personnel including Complaint Investigators, Chief School Administrators, Charter School and Renaissance School Project Leads, Administrators of Approved Private Schools for Students with Disabilities, and Directors of Special Education, with copies to Parents and to the

Office of Administrative Law, to comply with the following guidelines related to compensatory education:

- 1) The aim of compensatory education is to place students with disabilities in the same position they would have occupied but for the school district's violations of IDEA by providing the educational services the students should have received in the first instance. Additionally, the failure to fully implement a student's IEP, by definition, deprives the student of a FAPE. (Issue I)
- 2) The use of a quantitative approach or 1:1 ratio in deciding how much compensatory education a student should receive is required. In other words, if a student was supposed to receive 20 hours of speech therapy during the relevant time period and only received 5 hours, the student is entitled to a minimum of 15 hours of compensatory speech therapy. In some instances, the failure to fully implement the IEP may have permeated the entire IEP requiring one day of compensatory services for each day the IEP was not fully implemented. See, e.g., Tyler W. v. Upper Merion Sch. Dist., 963 F. Supp. 2d 427 (E.D. PA 2013). (Issue I)
- 3) Regression and a limited ability to recoup skills within a reasonable amount of time is not the standard for determining whether a student is entitled to compensatory education. Additional compensatory services may be required if regression occurs but only addressing regression is not sufficient because it does not place the students in the same position they would have been in had the IEP been fully implemented. (Issue II)
- 4) The failure to provide direct instruction by the related service provider or special education teacher for the frequency or duration set out in students' IEPs violates federal and state standards and entitles students to compensatory services for the time period they were without such instruction. (Issue III)
- 5) New IEP team meetings must be held for any student whose entitlement to compensatory education was determined under a regression and recoupment standard or for whom the amount of compensatory services was not determined using the quantitative approach. (Issues I & II)

- 6) In responding to complaints by parents who express concerns regarding the provision of special education and related services, SPDR will investigate and determine, among other things, whether the services were provided for the frequency and duration set out in the students' IEPs or complied with state requirements regarding the length of a school day or with requirements for active and direct instruction. (Issue III)
- 7) In responding to complaints by individual parents concerning their child and where the investigation shows that the same IDEA violation impacted other children in the district, SPDR, pursuant to its general supervisory authority under Part B of IDEA, will investigate and issue corrective action to address the provision of services for all similarly situated children. (All Issues)
- 8) Upon finding that schools violated IDEA by, among other things, not fully implementing a student's IEP or failing to provide appropriate virtual instruction, SPDR will determine the amount of compensatory services the student must receive, following Third Circuit precedent, and not leave it to the student's school to "consider" whether the student will receive any compensatory services and if so, how much. SPDR will also direct the school to work with the parent or adult student to determine how and when the compensatory services will be provided. (Issue IV)

*7. Please list the district personnel you have already talked with to resolve this complaint, along with their response(s) to your request.

N/A, since the violation was committed by SPDR. On February 2, 2021, ELC and several other advocacy organizations wrote to Governor Murphy and Acting Commissioner Angelica Allen-McMillan setting forth the need for comprehensive state guidance on compensatory education for students with disabilities. On March 18, 2021, a second letter was sent by the same organizations to Acting Commissioner Angelica Allen-McMillan and to Assistant Commissioner Peggy McDonald explaining the inadequacies of state guidance issued on March 3, 2021 regarding compensatory education and requesting corrective action. No response to that letter has been received.

Complainants are required to forward a copy of the complaint to the Chief School Administrator of the district/education agency against which the complaint is directed at the same time the complaint is filed with the Department of Education.

Check below to verify whether:

 X A copy of the complaint request was sent by electronic mail, with attachments, on May 26, 2021 to each of the following:

Angelica Allen-McMillan, Acting Commissioner, NJDOE
angelica.allen-mcmillan@doe.nj.gov

Dominic Rota, Director, NJDOE Office of Special Education Policy &
Dispute Resolution
dominic.rota@doe.nj.gov

Pursuant to N.J.A.C. 6A:14-9.2(b), please note that a complaint cannot be processed until the OSEP is notified that a copy was provided to the appropriate education agency.



Signature: _____
(Person(s) Submitting Request)

**ATTACHMENT TO COMPLAINT INVESTIGATION REQUEST AGAINST NJDOE AND
SPDR**

2. EXPANDED STATEMENT OF ALLEGED VIOLATIONS AND LEGAL AUTHORITY
AND

5. FACTS RELEVANT TO EACH ALLEGED VIOLATION

- I. NJDOE's and SPDR's policy and practice for implementing compensatory education violates federal and state requirements as well as United States Supreme Court and longstanding Third Circuit Court of Appeals' precedent. Specifically, in the March 3, 2021 "Guidance Regarding Compensatory Education Determinations for Students with Disabilities as a Result of COVID-19" 1) NJDOE and SPDR fail to tell schools that the failure to provide the special education and related services set out in a student's IEP, by definition deprives the student of a FAPE, entitling the student to compensatory services and 2) NJDOE and SPDR erroneously tell schools that a 1:1 ratio is not required when calculating the amount of compensatory services. Further, NJDOE and SPDR have implemented their illegal compensatory education policy in their response to parental complaints, explicitly and improperly telling school districts in their complaint investigation reports that districts are not required to provide compensatory services on a one-to-one basis for minutes/hours/days of instruction that were not provided in accordance with the students' IEPs.

Legal Authority:

- On April 27, 2020 the U.S. Secretary of Education notified Congress that "The Department is not requesting waiver authority for any of the core tenets of the IDEA or Section 504 of the Rehabilitation Act of 1973..."
- In response to a request by the Chicago Teacher's Union to waive certain IDEA requirements, the district court judge responded that only Congress could waive IDEA or Section 504 requirements and it had chosen not to do so. Chicago Teachers Union v. Devos, 2020 W.L. 3404749 (N.D. Ill. June 19, 2020).

- The State Educational Agency (SEA) is responsible for ensuring that a “free appropriate education is available to all children with disabilities residing in the State between the ages of 3 and 21 inclusive.” 20 U.S.C. Sec. 1412(a)(1).
- IDEA provides that courts may grant “such relief as [it] deems appropriate.” 20 U.S.C. Sec. 1415(i)(2)(C)(iii); 34 CFR 300. 516(c)(3).
- In Burlington School Comm. v. Mass. Dept. of Educ., 471 U.S. 359, 369 (1985), the Supreme Court held that “appropriate relief” included monetary reimbursement to parents who had paid expenses for their child’s education that the school district should have paid.
- In 1986, the 8th Circuit Court of Appeals, using the rationale in Burlington, found that compensatory education was also appropriate relief. See Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986).
- Currently, compensatory education is recognized by courts throughout the country as appropriate relief when school districts violate IDEA, including when students’ IEPs do not provide a FAPE or their IEPs are not fully implemented as written. See, e.g., Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990) (Compensatory education is intended as “a remedy to compensate [the student] for rights the district already denied ... because the School District violated [the] statutory rights while [the student] was still entitled to them.” Lester H., 916 F.2d at 872.
- According to binding precedent in this circuit, compensatory education “aim[s] to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA,’ by providing the educational services children should have received in the first instance.” G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015) (citations omitted); Ferren C. Sch. Dist. Of Philadelphia, 612 F.3d 712, 717-718 (3d Cir. 2020).
- The Third Circuit Court of Appeals has recognized that in evaluating the appropriateness of a student’s IEP, it is reasonable to consider the student’s progress under that IEP. See D.S. v. Bayonne, 602 F.3d 553, 567 (3d Cir. 2010).
- When a district fails to provide the special education and related services set out in the student’s IEP, however, there is no requirement to show that the student made insufficient progress because IDEA defines a FAPE to require the provision of special education and related services in conformity with the student’s IEP. 20 U.S.C. Sec. 1401(9); 34 CFR 300.17; N.J.A.C. 6A:14-1.1(d).

See also Hendrick Hudson Dist. Bd. Of Educ. V. Rowley, 458 U.S. 176, 188-89 (1982) (a free appropriate public education or FAPE by definition requires that the special education and services are provided in conformity with the student's IEP); Endrew F. v. Douglas Co. Sch. Dist., Re-1, 137 S.Ct. 988, 994 (2017) (same). As the court noted in Reid v. District of Columbia, 401 F.3d 516, 525 (D.C. Cir. 2005), "whereas ordinary IEPs need only provide some benefit, compensatory awards must do more—they must compensate..."

- As for determining the amount of compensatory services, the Third Circuit uses a quantitative approach to determine the amount of a compensatory education award. This means an hour for hour, day for day or a 1:1 ratio approach. See, e.g., Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990) (upholding an award of 30 months of compensatory education services for the 30 months that the student was without the residential placement the district agreed the student required); M.C. o/b/o J.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996) (holding that when the student's IEP does not offer FAPE, "a disabled child is entitled to compensatory education for a period equal to the period of the deprivation, but excluding the time reasonably required for the school district to rectify the problem").
- The quantitative approach is also applied when the school district fails to fully implement the student's IEP. See, e.g., D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260 (3d Cir. 2014) in which the Court of Appeals upheld the hearing officer's award of compensatory education in the amount of "one hour for each hour of each school day for each year he attended [Central Dauphin and]... fifteen hours for each of six weeks for missed summer programs for the years from 2000 to 2004." This hour for hour approach totaled 10,000 hours of compensatory education.
- When the student has an IEP but the school district fails to provide any schooling for a specified period of time, New Jersey courts have held that the student is entitled compensatory education on an hour for hour basis for each day without schooling. See, e.g., P.N. v. Greco, 282 F.Supp.2d 221, 236 (D.N.J. 2003). In P.N. the district court distinguished between revising a deficient IEP (as in M.C. o/b/o J.C. v. Central Regional Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996) where a school district is allowed a reasonable time to correct the deficiency) and a complete cessation of schooling for the student. The district court held that where there has been a complete cessation of

educational services, it is not reasonable for the student to be without instruction for any length of time and it awarded the student 17 days of education for the 17 days without any schooling; L.T. v. Mansfield Twp. Sch. Dist., No. 04-1381, 2009 WL 1971329 (D.N.J. July 1, 2009) (student entitled to 7 hours per school day for 17 days for a total of 119 hours consisting of 114 hours of general education and special education, three hours of speech therapy and two hours of occupational therapy. The district was also required to provide fifty hours for a school administrator to be present outside of the normal school hours and transportation costs).

- In Tyler W. v Upper Perkiomen Sch. Dist., 963 F. Supp. 2d 427 (E.D. PA 2013), the court held that the student was entitled to one day of compensatory education or a total of 420 hours for each day he received only one hour of academic instruction per day (an hour that was not in compliance with the specially designed instruction set out in the student's IEP) and none of the related services set out in his IEP. The district court judge found that the school district's failure to fully implement the student's IEP permeated his entire day, entitling the student to a full day of compensatory services for each day his IEP was not fully implemented.

Facts:

- 1) In its March 3, 2021 Guidance Regarding Compensatory Determinations for Students with Disabilities as a Result of COVID-19, NJDOE states that "compensatory education for services missed during the pandemic is provided when the failure to provide those services has denied the student his or her right to a FAPE."
- 2) It also states that "the goal of compensatory education is to remedy the knowledge and skill deficits that result when missed services are determined to have caused a denial of a FAPE."
- 3) Finally, NJDOE tells school districts "It is the role of the IEP team to determine the need [for] compensatory education necessary to address lack of progress toward IEP goals and objectives resulting from missed services." See similar language in paragraph titled "Determining the Need for Compensatory Education."
- 4) As is set forth in the federal and state law described above and was reaffirmed in Hendrick Hudson Dist. Bd. Of Educ., supra, and Endrew F.,

supra, the failure to provide the special education and services set out in a student's IEP by definition deprives the student of a FAPE.

- 5) There is no requirement to show a lack of progress resulting from the missed services as the court recognized in G.L. v. Ligonier, supra, when it ruled that compensatory education provides "the educational services children should have received in the first instance."
- 6) NJDOE's statement in its March 3, 2021 Guidance that "Neither the IDEA nor the State's special education regulations require a 1:1 ratio, when calculating the amount of compensatory education to be awarded to a student with a disability" completely ignores the requirements of judicial precedent.
- 7) Compensatory education is a judicially-created remedy based on the federal statute providing for "appropriate relief" when IDEA is violated, including when students' IEPs do not provide a FAPE or their IEPs are not implemented as written. See 20 U.S.C. Sec. 1415(i)(2)(C)(iii); 34 CFR 300.516(c)(3).
- 8) Further, the precedent in this circuit requires use of a quantitative approach or 1:1 ratio in determining the quantity of compensatory services a student should receive.
- 9) In C2021-6361 Hillsborough Township School District (decided January 15, 2021), SPDR tells the school district that "compensatory services, if any, are not required to be provided on one-to-one basis for hours of instruction that were not provided."
- 10) In C2021-6354 Mary A Dobbins School (decided October 26, 2020), SPDR says that "In considering compensatory services, it is not necessary that compensatory services be provided on a one-to-one basis..."
- 11) In C2021-6382 Highland Park School District (decided January 8, 2021), SPDR says that "Compensatory services are not required to be provided on one-to-one basis for hours of instruction that were not provided."
- 12) In C2020-6338 Mahwah School District (decided August 17, 2020), SPDR tells the district that compensatory services need not be provided on a one-to-one basis.

II. NJDOE and SPDR violated Third Circuit Court of Appeals’ precedent by telling school districts in their Complaint Investigation Reports and in NJDOE’s The Road Back (June 2020) to use regression without recoupment in a reasonable time as the standard for determining whether a student is entitled to compensatory education.

Legal Authority:

- There is no precedent in this or other circuits for linking a student’s entitlement to compensatory services for failure to implement the student’s IEP to whether the student regresses and doesn’t recoup skills with a reasonable time. Linking a student’s entitlement to compensatory services to whether the student regresses and doesn’t recoup skills within a reasonable time could never result in placing students in the same position they would have occupied but for the district’s violations of IDEA as required by G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015) and Ferren C. Sch. Dist. Of Philadelphia, 612 F.3d 712, 717-718 (3d Cir. 2020). At most, all it could do would be to return the students to where they were before the school district stopped providing the IEP services. Nor would it provide the educational services that the students should have received in the first instance as both G.L., supra, and Ferren, supra, also require.
- Courts of Appeal in other circuits have held that if an IEP is not appropriate or the IEP is not fully implemented, this may warrant additional compensatory services to address any regression that occurs. These courts also held, however, that only addressing the regression would not be sufficient because it would not place the students in the same position they would have been in had the IEP been appropriate or fully implemented. See e.g., B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016) (rejected district court decision that only awarded compensatory services to address the negative behaviors that manifested or worsened for the year the student was deprived of FAPE).
- In addition, courts have held that a student does not have to evidence regression or educational harm in order for the student to be entitled to compensatory services for failure to provide special education and/or related services set out in the student’s IEP. See, e.g., Turner v. District of Columbia, 952 F. Supp. 2d 31 (D. D.C. 2013) (rejected school district’s argument that failure to provide special education services in general

education class did not harm student because he earned a “C,” saying that the parent need not show an educational harm to prevail).

Facts:

- 1) NJDOE’s Guidance, The Road Back (June 2020), refers to “compensatory services” only once and that is on page 74 where NJDOE tells school districts that it “recommends that school districts consider the following when addressing the education of students with disabilities for the 2020-2021 school year”:
“IEP teams should consider the impact of missed services on student progress towards meeting IEP goals and objectives, and determine if additional or compensatory services are needed to address regression and recoupment of skills within a reasonable length of time.”
- 2) In response to parental complaints, SPDR also tells districts in its Complaint Investigation Reports that in deciding whether the child is entitled to compensatory education, “consideration should be given to regression, if any, without recoupment in a reasonable amount of time.” See, e.g., C2021-6361 Hillsborough Township School District (decided January 15, 2021); C2021-6382 Highland Park School District (decided January 8, 2021); C2021-6354 Mary A. Dobbins School (decided October 26, 2020); C2020-6338 Mahwah School District (decided August 17, 2020).
- 3) Multiple New Jersey school districts have incorporated into their reopening plans NJDOE’s recommendation on page 74 of The Road Back (June 2020) which incorrectly links entitlement to compensatory services to “regression and recoupment of skills within a reasonable length of time.” See, e.g., reopening plans of Tenafly Public Schools; Medford Township Public Schools; Millburn Township Schools; West Windsor-Plainsboro Regional School District; Freehold Regional High School District; Montgomery Township Public Schools; Livingston School District; and Lacey Township School District.
- 4) Consistent with these reopening plans, parents in Livingston and Lacey Township report being told by their districts that regression and recoupment would be used to determine their child’s entitlement to compensatory services.
- 5) Parents of children with disabilities who reside in other school districts have also been told that regression and recoupment will be used to determine if

their children are entitled to compensatory services. These districts include Old Bridge School District, Berkeley Heights School District, Elizabeth School District, Leonia School District, Lebanon Township School District, Howell School District and Brick Township School District.

- 6) In C2021-6364, Medford Township School District (October 30, 2020), SPDR told the district “In making the plan for compensatory education, the IEP team must consider the lack of educational services, and the student’s regression, if any, during that period.” At a minimum, this is misleading because it suggests that if there has been no regression due to the lack of educational services, the student would not be entitled to compensatory services. Regression is a factor that may require additional compensatory services but is not a prerequisite or required factor in order to be entitled to compensatory services.

III. In considering compensatory education claims, NJDOE and SPDR did not review all relevant information and make an independent determination as to whether districts provided the special education and related services for the frequency and duration set out in students’ IEPs or complied with state requirements regarding the length of a school day or for active and direct instruction.

Legal Authority:

- 20 U.S.C. Sec. 1412(a)(11) (SEA responsible for ensuring that the educational programs for children with disabilities “meet the educational standards of the State educational agency”); 34 CFR 300.149(a);
- 20 U.S.C. Sec. 1413(a)(1) requires LEAs’ programs to be consistent with state policies.
- 34 CFR 300.152(a)(4) requires NJDOE to “review all relevant information and make an independent determination” as to whether there is a violation of federal or state requirements.
- 34 CFR 300.151(b)(1) requires that when NJDOE determines there is a failure to provide appropriate services, it must address the failure through corrective action needed to address the needs of the child, such as compensatory services or monetary reimbursement.
- As is set forth above, IDEA defines a free appropriate public education to include the provision of special education and related services that are

provided in conformity with the student's IEP. 20 U.S.C. Sec. 1401(9); 34 CFR 300.17; 34 CFR 300.101 to 113; N.J.A.C. 6A:14-1.1(d). See also Hendrick Hudson Dist.Bd. Of Educ. V. Rowley, 458 U.S. 176, 188-89 (1982) (a free appropriate public education or FAPE by definition requires that the special education and services are provided in conformity with the student's IEP); Endrew F. v. Douglas Co. Sch. Dist., Re-1, 137 S.Ct. 988, 994 (2017) (same).

- N.J.A.C. 6A:14-4.1(a) provides that "Each district board of education shall provide educational programs, and related services for students with disabilities, required by the individualized education programs of those students for whom the district board of education is responsible."
- N.J.A.C. 6A:14-3.7(e)8 requires IEPs to include the frequency, duration and location of special education, related services and supplementary services.
- New Jersey regulations state that a school day "shall consist of not less than four hours, except that one continuous session of two and one-half hours may be considered a full day in kindergarten." N.J.A.C. 6A:32-8.3(b).
- A school day is "a day on which...students are under the guidance and direction of a teacher or teachers engaged in the teaching process." N.J.A.C. 6A:32-8.3(a).
- A half-day class shall be considered the equivalent of a full day's attendance only if in session for four hours or more, exclusive of recess periods or lunch periods." N.J.A.C. 6A:32-8.3(e).
- In Executive Order 175, the Governor stated that school districts are required to offer "active instruction" by an "appropriately certified teacher" with opportunities for both synchronous [in live time] and asynchronous [not live]" and in accordance with NJ Student Learning Standards.
- 34 CFR 152(a)(4) requires the SEA to "review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part...."

Facts:

1. SPDR did not indicate in any of the Complaint Investigation Reports discussed in this Complaint whether the virtual instruction provided by the school districts were for the required number of hours, consisted of active instruction by an appropriately certified teacher with opportunities for both synchronous and asynchronous instruction and was in accordance with N.J. Learning Standards.

2. Nor did SPDR consistently make findings of fact with respect to the frequency or duration of special education and related services contained in the students' 2019-2020 IEPs.
3. According to SPDR, the complainant in C2021-6359 Old Bridge School District (decided September 29, 2020) contended that her nephew was provided with insufficient services during school closures.
4. SPDR made no findings of fact with respect to the frequency or duration of special education and related services offered to the student during school closures.
5. Despite the absence of any factual support, SPDR found the district compliant.
6. In C2020-6338 Mahwah School District (decided August 17, 2020), according to SPDR, the parent in the June 1, 2020 Complaint claimed that the district did not provide all required related services during the period from June 1, 2019 to June 1, 2020 and that the district had not provided compensatory services to make up for services missed or not provided.
7. In Fact #2 of C2020-6338, SPDR found that the student's 2019-2020 IEP provided for counseling (one time per week), physical therapy (two times per week), occupational therapy (two times per week), speech-language therapy (two times per week), and one-to-one nursing in school and for transportation to and from school.
8. SPDR made no findings, however, as to what the student's IEP said the duration of each related services should be.
9. In Facts #14 and 16 of C2020-6338, SPDR found that the student received no related services for the period from March 16, 2020 to April 16, 2020.
10. In Fact #16 of C2020-6338, SPDR found that "On April 16, 2020, remote related services commenced in speech-language, occupational and physical therapy, and continued throughout the remainder of the 2019-2020 school year and into the 2020 ESY.
11. SPDR made no findings, however, as to whether once the remote related services were provided, they were provided for the frequency and duration as set out in the 2019-2020 IEP.
12. In C2021-6354 Mary A. Dobbins School (decided October 26, 2020) SPDR did not indicate the duration for related services set out in any of the students' IEPs.

- IV. Despite finding that districts violated IDEA by not fully implementing students' IEPs, including providing no educational services to some students for specified periods of time, NJDOE and SPDR did not take corrective action directing districts to provide a specific amount of compensatory services or monetary reimbursement to the students. Instead, in violation of their own obligations under IDEA, NJDOE and SPDR only told districts to "consider" whether to provide compensatory services or to "assess" or "determine the need" for compensatory services.**

Legal Authority:

- 34 CFR 300.151 (b) requires the SEA "In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address— (1) the failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement)...."
- IDEA expressly places the ultimate responsibility on States to ensure that all students with disabilities are provided with FAPE. 20 U.S.C. § 1412(a) and (a)(1).
- Moreover, the State's obligation to ensure that children with disabilities receive FAPE has been reinforced through case law in this Circuit dating back to 1980. See, e.g., Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980); Kruelle v. New Castle County Sch. Dist., 642 F.2d 697, 697-98 (3d Cir. 1981); M.A. v. State-Operated School Dist. of Newark, 344 F.3d 335, 340 (3d Cir. 2003).

Facts:

1. The only complaint investigation reports in which SPDR directed a district to provide a specific amount of compensatory services was when the school district conceded that the student was entitled to a specific number of services. See, e.g., C2020-6295 Bayonne School District (decided June 22, 2020) (district attorney agreed that sessions would be made up); C2020-6329 Paterson School District (decided September 9, 2020) ("district calculated that the student was entitled to 18 sessions of speech therapy due to service disruptions...")

2. Although the SPDR's findings of fact in C2020-6338 Mahwah School District (decided August 17, 2020) confirmed the parent's contention in their June 1, 2020 Complaint that the district did not provide all required related services during the period from June 1, 2019 to June 1, 2020 and thus had failed to provide appropriate services to the child, SPDR did not require the district to provide any remedy to the child as required by 34 CFR 151(b). Instead, SPDR stated in its Conclusion that "The district has appropriately determined to convene an IEP team meeting after the commencement of the 2020-2021 school year to review the student's program and progress, and address the need for any compensatory services."
3. SPDR provides no authority as to how it was "appropriate" for it not to decide the amount of compensatory services the student was entitled to receive but rather to require a student to wait months for the district to consider whether he would receive any compensatory services at all.
4. Moreover, in effect, all SPDR did was to tell the district that it could do what it wanted to do all along which was to do nothing until after the student had been in school several weeks and it would then hold an IEP meeting to "consider" whether to provide any compensatory services. See Fact #19 of C2020-6338.
5. In addition, in response to the parent's request for monetary reimbursement for missed sessions (Fact #10 of C2020-6338), SPDR stated in its Conclusion that "Under the regulations governing special education in New Jersey, the parent is not entitled to monetary compensation." N.J.A.C. 6A:14-4.1(a) is the only regulation cited by SPDR in its report and this regulation says nothing regarding monetary reimbursement for compensatory services.
6. Federal regulations pertaining to State complaint investigations state that where the SEA has found a failure to provide appropriate services, it must address corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement)..." 34 CFR 300.151(b)(1).
7. This is consistent with Third Circuit precedent which has held that compensatory education in the form of a trust fund for use by parents to obtain services for their child is appropriate. Ferren C. v. Sch. Dist. Of Phila., 612 F.3d 712 (3d Cir. 2010) (trust fund may be set up for use by parents for compensatory services); D.F. v. Collingswood Borough Bd. Of Educ., 694 F.3d 488 (3d Cir. 2012) (district may create a fund for compensatory services for

a student); D.E. v. Cent. Dauphin Sch. Dist. 765 F.3d 260 (3d Cir. 2014) (trust fund can be set up for the monetary value of compensatory services).

8. In C2021-6361 Hillsborough Township School District (decided January 15, 2021), SPDR found in Fact #2 that the student's IEP provided for 76 minutes per day of in-class resource instruction. After school facilities closed on March 13, 2020 to June 22, 2020, the student did not receive any in-class resource programming in literacy. (Facts #5 & 6)
9. SPDR did not direct the district to provide compensatory services to the student. Instead, it only directed the district to "determine the need for compensatory services."
10. In C2021-6354 Mary A. Dobbins School (decided October 26, 2020), SPDR found that two students were placed in behavioral disabilities classes rather than multiple disabilities classes (Fact #9); that the school was unable to document providing any related services to some children during specific time periods and was unable to document providing related services for the frequency and duration set out in any of the students' IEPs (Fact #11) and could not document that one student participated in the structured learning experience as required by the student's IEP (Fact #13).
11. SPDR did not direct the sending districts to provide compensatory services to any of these students. Instead, it only told the sending districts to "consider" the need for compensatory services.
12. In C2021-6364 Medford Township School District (decided October 30, 2020), SPDR found that the school was unable to document that it had implemented the behavior plan included in the student's IEP (See Conclusion) and also found the student was without any education during the period from December 5, 2019 to February 6, 2020.
13. SPDR did not direct the district to provide any compensatory services. Instead, it only told the district to "develop a plan for compensatory services" and to "consider the lack of educational services, and the student's regression, if any, during that period."
14. In C2021-6372 Willingboro School District (decided December 7, 2020), the student's IEPs provided for a personal aide five days a week for 360 minutes a day. (Facts #3, 13, 14)
15. The district did not provide the student with a personal aide starting on March 16, 2020 and continuing through ESY 2020 to September 16, 2020 (Facts #5, 6, 17, 23).

16. Again, SPDR did not direct the district to provide any compensatory services but only to convene an IEP meeting to determine if the student was in need of compensatory and/or supplemental services and to send written notice to SEA following the IEP meeting.
17. In C2021-6382 Highland Park School District (decided January 8, 2021), the student's IEP provided for in-class resource programs in language arts (90 minutes daily) and math (60 minutes daily). (Fact #2)
18. When the district went to a hybrid program starting October 19, 2020, the parent selected all remote due to child care issues. (Fact #8)
19. In accordance with NJDOE's July 24, 2020 Guidance Clarifying Expectations Regarding Fulltime Remote Learning Options for Families in 2020-2021, students had an "unconditional eligibility for fulltime remote learning that must offer the "same quality and scope of instruction" as in-person learning.
20. The student was assigned to a virtual class with a general education teacher and a paraprofessional providing support to 25 students in the class. There was no in-class resource program with a special education teacher or implementation of modifications and accommodations. (Fact #16, 17 & 19)
21. SPDR did not direct the district to provide compensatory services to the student but again only told the district to convene an IEP team meeting to determine the need for compensatory services.