



## Position Statement on Provision of Compensatory Education In Response to Lost Education as a Result of COVID-19

The COVID-19 pandemic forced schools throughout the country to close their doors and to provide education through distance learning. Students with disabilities continue to be entitled to a free appropriate public education (FAPE), which is defined for each student as the services provided in the student's individualized education program (IEP). While some students thrived; distance learning made the provision of some IEP services impossible, difficult, or ineffective. For many students, but especially students with disabilities, distance learning resulted in loss of educational progress and even regression.

While schools have the obligation to remediate the loss of educational opportunities for all students, they have an additional obligation for students with disabilities. When a student with a disability has not been provided with a FAPE for a period of time, the school district is obliged to compensate for those loss of services by providing compensatory education to place the student in the same position the student would have been in had a FAPE been provided during the period.

Compensatory education's goal is to put the student in the place he or she would have been had FAPE been provided and the student had not been deprived of special education and related services. It is determined based on a student's individual needs and "Compensatory education aims to make up for educational services the child should have received in the first place." *Doe v. East Lyme Board of Education*, 2020 U.S. App. LEXIS 190512 (2d Cir. June 18, 2020). Such services "should place children in the position they would have been in but for the violation of the Act." *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

The relevant question is whether the student was deprived of a FAPE for a period of time. The U.S. Department of Education made clear that students are entitled to compensatory education due to the COVID-19 closures.<sup>1</sup>

While school administrator organizations generally acknowledge that students with disabilities are entitled to "compensatory services," a recent document disseminated by Council of Administrators of Special Education (CASE)<sup>2</sup> states that compensatory education is not an appropriate remedy because school districts were not at fault for the COVID-19 closure and its impact on a FAPE. CASE contends the term "compensatory education" is punitive and only applies when a hearing officer or judge orders a remedy. This approach neglects the needs of the student, presumes every district provided special education and related services to all students with disabilities, and is an attempt to circumvent legal obligations under a cloak of terminology.

Districts and parents must work together to determine what each student needs upon the reconvening of school. The student's IEP team will need to meet and determine present levels of performance as a prerequisite to designing an appropriate program and placement. Parents should have a significant voice in specifying the student's current level of performance. If the student's performance is below where it was on the day

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<sup>1</sup> See: 1) [Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak](#) and 2) [Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities](#)

<sup>2</sup> *Considering Services for Students with Disabilities Moving Forward: What is the Real Definition of Compensatory Education?* Council of Administrators of Special Education Position Statement, June 23, 2020.

schools closed for the COVID-19 pandemic, or if the achievement gap has widened due to the closure, the IEP team is obliged to provide more intense services than those provided in the prior IEP.

It should be an irrefutable presumption that students who were unable to access remote education are to automatically be awarded compensatory education; this includes students and families who had cognitive, behavioral, language or technological barriers to accessing an education; students who were unable to access an education because the district did not implement any of the IEP, or refused to implement or cancelled related services such as occupational therapy, physical therapy or speech therapy.

However, not every student will need compensatory education. Some students have been able to progress appropriately in the at-home program. Yet, everyone agrees that some students have already experienced significant regression without the special education and related services that they needed. In each case, the IEP team must, after the closure ends, closely examine the student's progress or regression, craft accurate present levels of performance, and provide services based on the needs established by the student's data.

Indeed, under *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), the standard for compensatory education is not an hour for hour calculation. Rather, "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.* at 524. It is a qualitative standard based on individual assessments of the student.

Still, the district does not need to be shown to be at fault or a bad actor for a student to be entitled to compensatory education. For example, even if a district tried its best to find a placement for a particularly challenging student but was unable to find an appropriate placement, the student is entitled to compensatory education. Similarly, the reason for not providing related services during the closure may or may not lie with district. The fact is, regardless, that the student did not receive mandated services. Some schools had a robust response to the COVID-19 closures but were unable to meet the needs of certain students. Other schools hardly tried. It does not matter. A student who did not receive a FAPE is entitled to compensatory education.

There can be little doubt that the standard for remediation for students with an IEP is to place the student where he or she would have been but for the closure. As school administrators do not like the term "compensatory education," the solution is to provide the remedial services needed as a regular course of business. If school districts do that, there will be no need for hearing officers or judges to get involved in ordering compensatory education. Students will get what they need without any need to address whether schools did everything they reasonably could to provide FAPE during the period of COVID-19 closure.

July 9, 2020