## RESPONDING TO LACK OF PROGRESS

Wyoming Department of
Education
Special Education Law Series
April 14, 2022

**Amy J. Goetz** 



# FREE APPROPRIATE PUBLIC EDUCATION

Required by the IDEA Required by Section 504

Recovery Services When FAPE is Not Delivered



## ENDREW F.

United States Supreme Court

Law of the Land

**Markedly More Demanding Standard** 

**Requires PROGRESS** 



### ENDREW F.

IEP Must Be Reasonably
Calculated to Enable Progress

Progress Must Be Appropriate
in Light of the Child's
Circumstances: Present Levels
of Performance, Disability and
Ability



## ENDREW F.

**Individualized Analysis** 

**Challenging Objectives** 

**Ambitious Goals** 



## **SECTION 504**

- Equal Access
- Equal Participation
- Equal Benefits
- Discrimination Prohibited



### **FRY**

**U.S. Supreme Court** 

504 and ADA Coexist with IDEA

Not Every Educational Harm Has an IDEA Remedy



## COMPENSATORY EDUCATION SERVICES

**Roots in School Desegregation Cases** 

To Restore Students to Status Absent Discrimination



## ANY APPROPRIATE RELIEF

Private Tuition Reimbursement

**Compensatory Education:** 

- To Pay Expenses That Should Have Been Paid
- To Restore Lost Benefits of FAPE



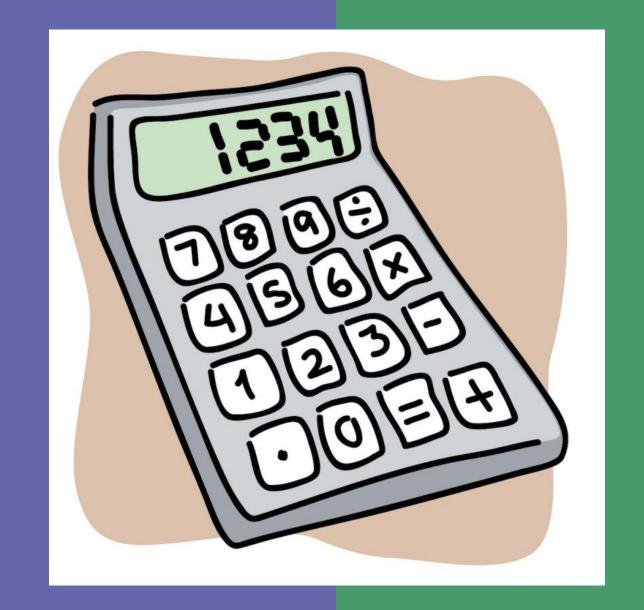
### **CALCULATIONS**

**Quantitative Approach** 

Replacement for Period Equal to Period of Deprivation

**Hour-for-Hour** 

Formula-Based



## **CALCULATIONS**

**Qualitative Approach** 

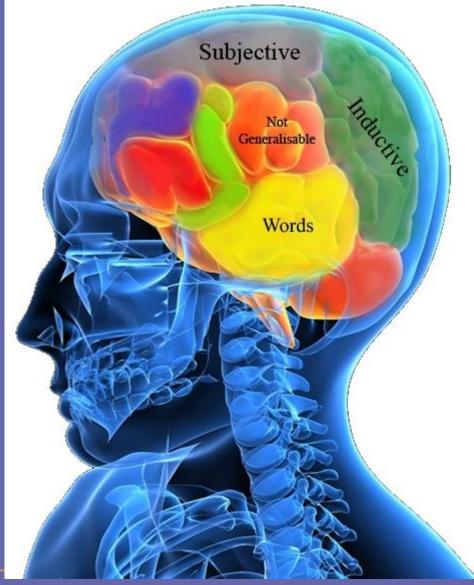
**Flexible** 

**Based on Individual Needs** 

**Spectrum of Compensatory Relief** 

**Better Reflects IDEA** 

## Qualitative



## COVID IMPACTS

No Services to General Population

No Services to Students With Disabilities



## RIGHT TO FAPE

Any Services to General Population

Students With Disabilities Entitled to a FAPE



## RIGHT TO A FAPE

**To the Greatest Extent Possible** 

**Services in IEP or 504 Plan** 

Impossibility Excuses Temporary Modifications

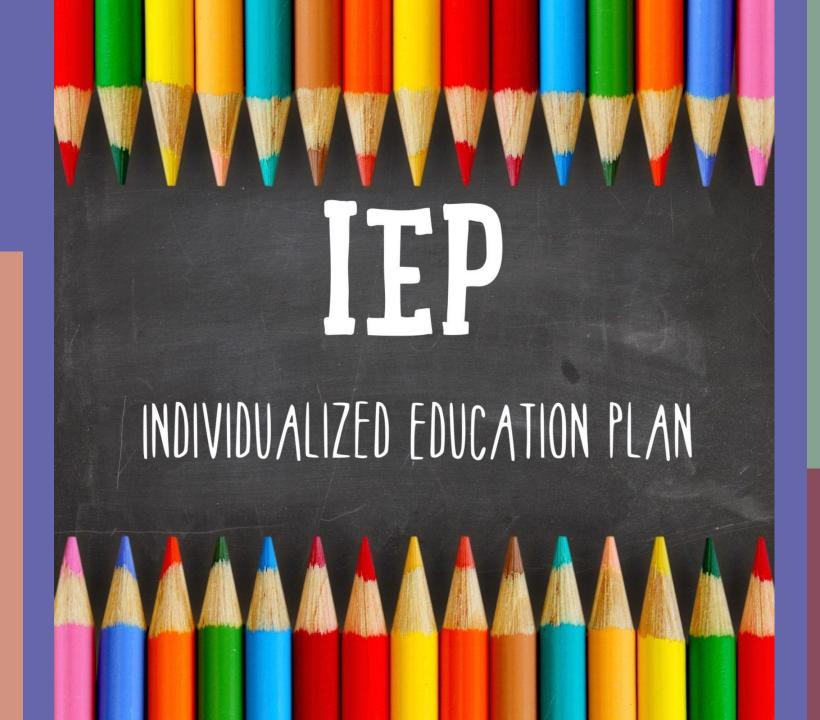


## COMPENSATORY SERVICES

**IEP or 504 Teams Decide** 

**Individualized Determination** 

Whether and To What Extent
Needed to Make Up for Lost
Skills



## COMPENSATORY SERVICES

Address for Early Intervention
Services Missed

Address for Extended Absences

Address for Inaccessible Services



## COMPENSATORY SERVICES

**Address Whenever Progress is Reduced** 

**Address Whenever Services are Delayed** 

**Address Whenever Services are Changed** 

**Address Whenever Needs Have Changed** 



## COMPENSATORY SERVICES

Parents, Educators and
Administrators Collaborate
Creatively to Meet Student
Needs

Dispute Resolution Systems
Remain Available



## COMPENSATORY SERVICES

**One Means of Recovery** 

Student and Family Reengagement

**Parent Support** 

**Educator Support** 



## LEARNING ACCELERATION

**Design Environments and Conditions to Overcome Adverse Effects** 

Respond to Social, Emotional and Mental Health Needs

**Especially Those Who Lost the Most** 



## LEARNING ACCELERATION

Tailored to Differentiate Instructional Pathways

**High Expectations** 

**Rigorous Accountability** 

**Educational Equity** 



## LEARNING ACCELERATION

Acceleration Rather than Remediation

**Evidence-Based Tutoring Practices are Key** 



### ACCELERATED LEARNING

#### **Most Effective Tutoring:**

- Trained Educators
  - High Dosage
- During the School Day
- Attendance and Focused Worktime if Not
- Aligned with Evidence-Based Curriculum



## RECOVERY SERVICES

**General Education Recovery** 

**Enhanced IEP Services** 

**Enhanced ESY** 

**Compensatory Services** 



## RECOVERY SERVICES

**Quick Diagnoses of Gaps in Skills and Concepts** 

**Expanded Day, Week or Year** 

**Summer Learning** 

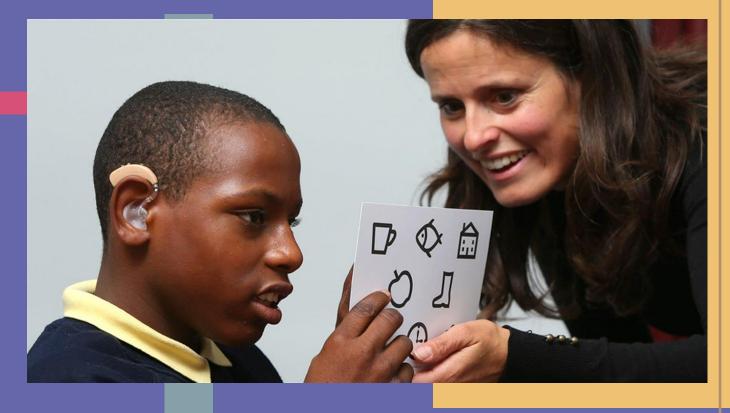


## COMPENSATORY SERVICES

Prospectively Address Past Failure or Inability to Provide Appropriate Services

#### **Consider:**

- Present Levels
- Previous Rate of Progress
  - Prior Services



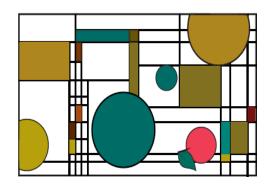
## COMPENSATORY SERVICES

**Proactive Mitigating Measure** 

Use Sound Educational
Judgment

Provision Does Not Draw Into Question School's Good Faith Efforts





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#### RESPONDING TO LACK OF PROGRESS

WAVES Special Education Law Series
Wyoming Department of Education

### Responding to Lack of Progress: Qualitative and Quantitative Remedies of Recovery Services

April 14, 2022 Amy J. Goetz

#### I. INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Every discussion of the obligation to respond to a student's lack of progress must start with an understanding of the measure of progress that is required under the law through the provision of a free appropriate public education (FAPE). There are statutory and regulatory standards that are interpreted and applied by hearing officers and courts, as well as guidance to the field from state and federal regulatory authorities. The amount of progress required to comply with the law is an individualized analysis for each learner, based on his or her unique circumstances.

#### A. Statutory FAPE Requirements

The primary purpose of the IDEA is:

to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

20 U.S.C. § 1400(d)(1)(A).

The IDEA requires that each State ensure -

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1412(a)(1).

The IDEA defines a FAPE as follows:

The term "free appropriate public education" means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the

State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

#### B. Case Law Applying the FAPE Mandate

#### 1. United States Supreme Court

The Supreme Court considered substantive FAPE for the first time in its 1982 *Rowley* decision. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). This case established that a FAPE is provided when a student's IEP is "sufficient to confer some educational benefit." *Id.* at 200.

Thirty-five years later the Court addressed for a second time in *Endrew F*. the substantive FAPE standard, and held that the IDEA demands "a markedly more demanding" approach to FAPE than the *de minimis* standard that allowed students to "[sit] idly . . . awaiting the time when they were old enough to drop out." Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S.Ct. 988, 1000-1001 (2017). The Court held that IEPs must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" and explained that those circumstances are the child's present levels of performance, disability and ability. Id. at 999. The Court elevated the standard by its focus on progress and not merely benefit, by deciding that all students are due "the chance to meet challenging objectives," and for those not fully integrated into general education where passing grades measure progress, their IEPs "must be appropriately ambitious in light of [their] circumstances." Id. at 1000. An analysis of whether goals are appropriately ambitious and objectives are challenging sufficient to produce *progress* is now a required and key component of the determination of how much progress is sufficient to pass muster for a FAPE. This should result in a more robust and demanding standard by which to assess the adequacy of progress for every student on an IEP who is not fully integrated into the general education classroom and curriculum. This should also result in a more accessible language for IEP Teams to discuss and determine important issues of FAPE for students.

#### 2. Tenth Circuit Court of Appeals

The Tenth Circuit includes Wyoming and its decisions are binding authority. The Tenth Circuit interpreted *Rowley*'s FAPE standard to require "merely more than *de minimis*," or trivial, educational benefit, severely limiting the scope of the IDEA's most fundamental promise. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10<sup>th</sup> Cir. 2015), *vacated sub nom. Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 694 F. App'x 654 (10<sup>th</sup> Cir. 2017). This *de minimis* test represents the lowest possible measure, as the only increment lower than "some" is "none." Thus, *any progress at all* was deemed sufficient to pass muster under that now rejected standard. This was the standard *directly rejected and reversed* by the U.S. Supreme Court in *Endrew F.*, 137 S.Ct. at 1001. It is no longer the applicable measure of a FAPE anywhere. As required, post-*Endrew F.* cases from the Tenth Circuit apply the updated standard and cases decided under the now rejected pre-*Endrew F.* standard from this circuit are of little consequence and should not be relied upon for guidance.

#### II. SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act also requires the provision of a FAPE to students with disabilities in public schools. It prohibits discrimination on the basis of disability by any recipient of federal funds and provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C. § 794. Section 504 protects students with disabilities in public schools who are "qualified" if -

of an age during which persons without disabilities are provided such services, of any age during which it is mandatory under state law to provide such services to persons with disabilities, or to whom a state is required to provide a free appropriate public education under the IDEA.

34 C.F.R. § 104.3(1). An individual with a disability is one who –

has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

34 C.F.R. § 104.3(j).

#### A. Regulatory FAPE Requirements

Section 504 itself does not directly define or require a FAPE but its implementing regulations do. The U.S. Department of Education regulations implement Section 504 and require school districts to provide a free appropriate public education to qualified students with a disability in the least restrictive environment. Federal regulations provide:

A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

34 C.F.R. § 104.33(a). The regulations define "appropriate education" as follows:

- (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that -
  - (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and
  - (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.
- (2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.
- (3) A recipient may place a handicapped person or refer such

a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

34 C.F.R. § 104.33(b).

#### B. Case Law Applying the FAPE Mandate

The IDEA has long eclipsed school district obligations and student rights under Section 504 and the Americans with Disabilities Act. The evolving view of the relationship between the IDEA and the federal laws prohibiting discrimination on the basis of disability in schools is that these obligations and rights are separate and distinct. That is, schools are obligated to comply with the requirements of all three federal laws and students are entitled to the protections of all three federal laws. While there is some overlap, while discrimination claims require proof of intent, and while exhaustion of administrative remedies under the IDEA remains a consistent question, it appears that disability discrimination protections are emerging as strong and additional sources of student rights that can no longer be ignored without peril. Money damages and injunctive relief are available under Section 504 and the ADA in addition to the equitable relief available under the IDEA. However, courts have not directly addressed the standard for provision of a FAPE under Section 504 as opposed to the IDEA. This is likely because the trend is stronger in the direction of illuminating the differences between special education and non-discrimination rights and remedies in order to give effect to all federal laws protecting students with disabilities.

#### 1. United States Supreme Court

The Court has not yet decided a case applying Section 504 and the right to a FAPE in public schools, but did recently decide a case about the relationship between IDEA and Section 504 that is informative. *Fry* recognized that recovery of compensatory damages and injunctive relief are available remedies for disability discrimination under Section 504 and the Americans with Disabilities Act separate from and in addition to the remedies available under IDEA.

After a long and harried history of misunderstanding regarding the interplay between the IDEA and Section 504,<sup>1</sup> we now recognize that disability discrimination and special education claims are separate and distinct claims, and disability discrimination claims are not eclipsed by special education claims. The IDEA contains an explicit preservation of disability discrimination claims in its exhaustion of administrative remedies provision that would be meaningless if those claims were duplicative. 20 U.S.C. § 1415(*l*). That provision "reaffirmed the viability' of federal statutes like the ADA or Rehabilitation Act 'as separate vehicles' no less integral than the IDEA 'for ensuring the rights of handicapped children."

According to that opening phrase, the IDEA does not prevent a plaintiff from asserting claims under such laws even if, as in *Smith* itself, those claims allege the denial of an appropriate education (much as an IDEA claim would).<sup>3</sup>

The next phrase imposes a limit on pursuit of discrimination claims by requiring first exhaustion of administrative procedures under the IDEA when seeking relief that is also available under the IDEA.<sup>4</sup>

The *Fry* decision unpacked further the distinction between the IDEA and federal non-discrimination protections, a case determining the extent and limits of the IDEA's exhaustion of administrative remedies requirement. The Court recognized that the IDEA is not the only federal statute protecting the interests of children with disabilities but it exists alongside Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (504).<sup>5</sup> While the IDEA is focused exclusively on the guarantee of "a free appropriate public education," the ADA and Section 504 require modifications to policies, practices

<sup>&</sup>lt;sup>1</sup> The U.S. Supreme Court misinterpreted the relationship between the predecessor to the IDEA and non-discrimination laws in 1984 in *Smith v. Robinson*, holding that special education law was the exclusive avenue of relief for students with disabilities to challenge the adequacy of their education, leading to Congressional correction in the Handicapped Children's Protection Act of 1986. *Fry v. Napolean Community Schs.*, 137 S.Ct. 743, 750 (2017).

<sup>&</sup>lt;sup>2</sup> *Id.* at 750, citing H.R.Rep. No. 99-296, pp. 4 and 6 (1985).

 $<sup>^3</sup>$  Id.

<sup>&</sup>lt;sup>4</sup> *Id*.

<sup>&</sup>lt;sup>5</sup> *Id.* at 749.

<sup>&</sup>lt;sup>6</sup> *Id*.

and procedures in order to avoid discrimination.<sup>7</sup> The ADA and Section 504, unlike the IDEA, authorize individuals to seek redress for violations by bringing suit for injunctive relief and money damages.<sup>8</sup> As the Court recognized, "[a] school could offer a FAPE to a child with a disability but still run afoul of the law's ban on discrimination" and regardless of whether a child is denied a FAPE, schools may not violate Title II and § 504 by discriminating against children with disabilities.<sup>9</sup>

Fry involved a claim of disability discrimination under the ADA and 504 when a public school denied equal access to the school and its programs by refusing to accommodate the use of a service animal, resulting in emotional distress, pain, embarrassment and mental anguish, seeking declaratory relief and damages. The Court reversed the Sixth Circuit's determination that the harms were generally educational and harmed her at school, requiring exhaustion of the IDEA. Because exhaustion is required only in suits where relief is available under the IDEA, and the only relief available under the IDEA is for the denial of a FAPE, the discrimination claims were not required to be exhausted. In other words, the discrimination claims were separate and distinct from the special education claim. [E]ven when the suit arises directly form a school's treatment of a child with a disability – and so could be said to relate in some way to her education - . . . [a] school's conduct toward such a child – say, some refusal to make an accommodation – might injure her in ways unrelated to a FAPE . . . "11

Because the Supreme Court has not addressed the issue of the right to a FAPE under the IDEA *and* Section 504/ADA, it has so far evaded the question of how the non-discrimination provisions of federal law inform the right to *equal access and benefits* to students with disabilities in assessing the full analysis of the right to a FAPE with the combined strength of this trio of federal protections. Stay tuned.

#### 2. Tenth Circuit Court of Appeals

Similarly, this Court has not yet decided a case applying Section 504 and its FAPE provision, but has decided a number of cases involving student claims of

<sup>&</sup>lt;sup>7</sup> *Id*.

<sup>&</sup>lt;sup>8</sup> *Id.* at 750.

<sup>&</sup>lt;sup>9</sup> *Id.* at 751.

<sup>&</sup>lt;sup>10</sup> *Id.* at 752.

<sup>&</sup>lt;sup>11</sup> *Id.* at 754.

both IDEA and Section 504/ADA violations. In Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809, 812 (10<sup>th</sup> Cir. 1989), the Court decided that special education claims are not the exclusive remedies available to students with disabilities from public schools. In Urban v. Jefferson Cty. Sch. Dist. R-1, 89 F.3d 720, 728 (10th) Cir. 1996), the Court determined that if a child is not entitled to a neighborhood placement under the IDEA, he is not entitled to it under Section 504. In *Padilla v*. Sch. Dist. No. 1 of Denver, 233 F.3d 1268, 1274 (10th Cir. 2000), the Court held that disability discrimination claims for injuries suffered by a student from a fractured skull when not provided sufficient supports were separate and distinct from special education claims. In Ellenberg v. New Mexico Military Institute, 478 F.3d 1262, 1280-81 (10<sup>th</sup> Cir. 2007), the Court held that Section 504 and ADA claims for denial of admission on the basis of disability need not first be exhausted in IDEA proceedings because "[i]n the context of these pure discrimination claims, the IDEA offers no relief, for they do not relate to the provision of a FAPE in the least restrictive environment." "[T]he IDEA is simply not an anti-discrimination statute." Id. The Ellenberg decision also confirms that Section 504 and ADA claims can exist even if a school fulfills its FAPE obligations under the IDEA. Id. In Miller v. Bd. of Educ. of Albuquerque Public Schs., 565 F.3d 1232 (10th Cir. 2009), the Court confirmed the separate and distinct nature of IDEA and Section 504/ADA claims and held that a determination of denial of a FAPE under the IDEA does not compel finding that the school district violated Section 504 or the ADA.

#### III. COMPENSATORY EDUCATION SERVICES

The concept of compensatory or remedial educational services has its genesis in school desegregation cases, where remedies for harms suffered by students in segregated schools included equitable considerations. The remedy was understood to be necessarily determined by the nature and scope of the violation, remedial in nature and designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. It is a natural extension to apply this concept to the IDEA, enacted to correct the exclusion and neglect of students with disabilities by the public schools.

Compensatory education services have become the primary remedy under the IDEA for the denial of a FAPE to students whose parents have not unilaterally

<sup>&</sup>lt;sup>12</sup> Milliken v. Bradley, 433 U.S. 267 (1977).

<sup>&</sup>lt;sup>13</sup> *Id.* at 280.

placed them in a private school and sought tuition reimbursement.<sup>14</sup> If a hearing officer or court concludes that a child's IDEA rights were violated, it may award "such relief as the court determines is appropriate."<sup>15</sup> That provision "confers broad discretion on the court" to craft equitable remedial awards "in light of the Act's broad purpose of providing children with disabilities a FAPE."<sup>16</sup> This includes the authority to award equitable monetary relief in the form of reimbursement for past or future educational expenses, called "compensatory" relief.<sup>17</sup>

The Eighth Circuit Court of Appeals first recognized that compensatory education is the "poor man's" corollary to private services as a remedy for violations of the IDEA for families who could not afford private educational services for their child for denial of a FAPE, extending the right to a remedy to injunctive relief ordering a public school to provide future services to compensate for past educational harm. <sup>18</sup> After a long and complicated series of appeals, the Court reversed its previous determination that compensatory education services were damages and not available as relief for special education violations. The Supreme Court's determination in Burlington altered the Court's understanding of what 'damages' includes in the context of the [IDEA]."19 The Court recognized what Burlington made clear: reimbursement for private educational services is not damages because it "merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP."<sup>20</sup> The Court also understood that if this relief were unavailable, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete," a result Congress did not intend by authorizing the grant of "appropriate" relief.<sup>21</sup> The Court found:

> We cannot agree with the defendants that they should escape liability for these services simply because Clyde Miener was unable to provide them in the first instance; we believe that such a result

<sup>&</sup>lt;sup>14</sup> Private school tuition reimbursement was first recognized as an available remedy for FAPE violations in *Burlington Sch. Committee v. Dept. of Educ.*, 471 U.S. 359 (1985). <sup>15</sup> 20 U.S.C. § 1415(i)(2)(C)(iii).

<sup>&</sup>lt;sup>16</sup> Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 237-38 (2009).

<sup>&</sup>lt;sup>17</sup> *Id.* at 237-43.

<sup>&</sup>lt;sup>18</sup> Miener v. Missouri, 800 F.2d 749, 751-752 (8th Cir. 1986).

<sup>&</sup>lt;sup>19</sup> *Miener*, 800 F.2d at 753.

<sup>&</sup>lt;sup>20</sup> *Id.*, quoting *Burlington*, 105 S.Ct. at 2003.

<sup>&</sup>lt;sup>21</sup> *Id.* (emphasis in original).

would be consistent neither with *Burlington* nor with congressional intent. Like the retroactive reimbursement in *Burlington*, imposing liability for compensatory educational services on the defendants 'merely requires [them] to belatedly pay expenses that [they] should have paid all along,' 105 S.Ct. at 2003. Here, as in *Burlington*, recovery is necessary to secure the child's right to a free appropriate public education. *Id.* We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs.<sup>22</sup>

The award of compensatory educational services "to be provided prospectively to compensate for a past deficient program" has been recognized as appropriate by every other circuit to address the issue directly. Although differences exist in the methods of calculating compensatory education services, "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." The Second Circuit recognized early on the fundamental importance of compensatory education to the core promise of a FAPE in the IDEA.

We do not believe that Congress intended to create a right without a remedy. If, in this case, we do not allow an award of compensatory education, then [the student's] right to an education between the ages of three and twenty-one is illusory [He] cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.<sup>26</sup>

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<sup>&</sup>lt;sup>22</sup> *Id.*, (emphasis in original).

<sup>&</sup>lt;sup>23</sup> G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003).

<sup>&</sup>lt;sup>24</sup> Somberg v. Utica Community Schs., 908 F.3d 162, 171 (6<sup>th</sup> Cir. 2018); Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 456 (2<sup>nd</sup> Cir. 2015); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 249 (3<sup>rd</sup> Cir. 1999); Erickson v. Albuquerque Public Schs., 199 F.3d 1116 (10<sup>th</sup> Cir. 1999)(citing Miener with approval); Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654, 656 (7<sup>th</sup> Cir. 1996); Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1496 (9<sup>th</sup> Cir. 1994); and Pihl v. Mass. Dep't of Educ., 9 F.3d 184, 188-189 (1<sup>st</sup> Cir. 1993)

<sup>&</sup>lt;sup>25</sup> Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005).

<sup>&</sup>lt;sup>26</sup> Burr by Burr v. Ambach, 863 F.2d 1071, 1078 (2<sup>nd</sup> Cir. 1988), citing Miener v. State of Mo., 800 F.2d at 753.

The Sixth Circuit affirmed "[a]n award of one year of tutoring to compensate a student for one year of being denied a FAPE"<sup>27</sup> and characterized the award as resting on a "principled basis" adhering to the qualitative approach to "flexibly calculate compensatory education in terms of placing the student in the same position that he or she would have occupied but for the school district's IDEA violations."<sup>28</sup> The award was intended to put the student in the same position that he "would have occupied but for the school district's violations of IDEA."<sup>29</sup>

Compensatory education is simply an award of educational services "to be provided prospectively to compensate for a past deficient program," built on the U.S. Supreme Court's holding in *Burlington* that private school tuition is an appropriate form of relief.<sup>30</sup> Compensatory education provides services "prospectively to compensate for a past deficient program."<sup>31</sup> "To fully compensate a student, the award must seek not only to undo the FAPE denial's affirmative harm, but also to compensate for lost progress that the student would have made."<sup>32</sup> That inquiry requires "figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position."<sup>33</sup> "For the successful parent to be left with what should have been the [school district's] bill *ab initio* does not seem a municipal protection Congress would have intended, however great the shortage of funds."<sup>34</sup>

#### A. Calculating Compensatory Education

There are two approaches to calculating the proper scope of compensatory education awards. First the Third Circuit formulated the "quantitative approach" defined as "compensatory education for a period equal to the period of deprivation."<sup>35</sup> This standard applies a simple calculus of services lost or insufficient to be provided to replace the services that should have been provided in the first instance without regard to the effects of delays or other equitable

<sup>&</sup>lt;sup>27</sup> Somberg v. Utica Community Schools, 908 F.3d 162, 175 (6<sup>th</sup> Cir. 2018).

<sup>&</sup>lt;sup>28</sup> *Id.*, citing *Bd. of Educ. of Fayette Cty. v. L.M.*, 478 F.3d 307, 316 (6<sup>th</sup> Cir. 2007), citing *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 524 (D.C. Cir. 2005).

<sup>&</sup>lt;sup>29</sup> *Id.*, quoting *Bd. of Educ. of Fatyette Cty. v. L.M.*, 478 F.3d 307, 317 6<sup>th</sup> Cir. 2007)

<sup>&</sup>lt;sup>30</sup> *Reid*, 401 F.3d at 522.

<sup>&</sup>lt;sup>31</sup> G ex rel. RG v. Fort Bragg Dependent Sch., 343 F.3d 295, 308 (4th Cir. 2003).

<sup>&</sup>lt;sup>32</sup> B.D. v. Dist. of Columbia, 817 F.3d 792, 798 (D.C. Cir. 2016).

<sup>&</sup>lt;sup>33</sup> *Id.* at 799.

<sup>&</sup>lt;sup>34</sup> *Doe v. Brookline*, 722 F2d 910, 921 (1st Cir. 1983).

 $<sup>^{35}</sup>$  M.C. ex rel. J.C. v. Central Regional Sch. Dist., 81 F.3d 389, 397 (3rd Cir. 1996).

factors. It is sometimes referred to as a "formula-based" award. It is a manageable and logical way to calculate replacement services usually based on past or current IEP Team determinations of needed services.

Then the D.C. Circuit articulated the "qualitative approach" that rejected an hour-for-hour calculation in favor of a more flexible standard that focuses on compensating past violations based on each student's individual needs.<sup>36</sup> This approach recognizes a spectrum of possible compensatory programs from short and intensive targeted at specific problems to extended programs "perhaps even exceeding hour-for-hour replacement of time spent without FAPE."37 This standard requires consideration of equitable factors, a fact-specific and individualized assessment of the learner's needs, and "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." In other words, the award "should aim to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA."38 Equitable considerations, like the parties' conduct, may affect the calculation of the award. This means of calculating compensatory education services better reflects the individualized focus on the child on which the IDEA rests and recognizes the compounded educational harm caused by delays in provision of services.

#### IV. COVID-RELATED OBLIGATIONS AND RECOVERY SERVICES

During the COVID-related school shutdowns, all students, including students with disabilities, received different instruction than was provided before the shutdowns while they were at home and schools were closed or partially reopened. A host of federal guidance from the U.S. Department of Education (DOE) has addressed COVID-related obligations of schools including to provide for recovery services as needed. This guidance represents the interpretation of the Department of applicable statutes and regulations and is not legally binding.

The DOE advised schools that when schools shut down without the provision of educational services to the general student population, then services to students with disabilities were not required to be provided during that same period of time. *Questions and Answers on Providing Services to Children with* 

<sup>&</sup>lt;sup>36</sup> *Reid*, 401 F.3d 516, 523.

<sup>&</sup>lt;sup>37</sup> *Id.* at 524.

<sup>&</sup>lt;sup>38</sup> *Id.* at 523.

Disabilities during a COVID-19 Outbreak, (OSERS March 12, 2020). The DOE was clear that, regardless of the operational model, including distance learning or hybrid learning, students with disabilities continued to be entitled to a FAPE, and 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 IEP developed under the IDEA, or a plan developed under Section 504." Id. In other words, only if it was impossible to maintain the same special education and related services the student's IEP Team last decided were necessary to provide a FAPE before the pandemic (type, method, frequency, location, intensity and duration), were necessary modifications to the IEP tolerated and only on a temporary basis. Each LEA "must make every effort to provide special education and related services to the child in accordance with the child's . . . IEP . . . or Section 504 . . . plan." Id. Exceptional circumstances could affect how a particular service is provided. *Id.* Each IEP and Section 504 Team "would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements." Id.

The DOE directed that if a child with a disability is absent for an extended period due to infection while schools remain open, special education and related services must be provided as homebound instruction to the extent the child is available for instruction and could benefit from them. *Id.* "If a child does not receive services after an extended period of time, a school must make an individualized determination whether and to what extent **compensatory services** may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost." *Id.* 

The DOE indicated that if a school for children with disabilities is selectively closed down due to the possibility of severe complications from infection, "the LEA must determine whether each dismissed child could benefit from online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available." *Id.* "The Department understands there may be exceptional circumstances that could affect how a particular service is provided." *Id.* If a child does not receive services during a closure, his or her IEP or 504 Team "must make an individualized determination whether and to what extent **compensatory services** may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost." *Id.* 

The DOE said that IDEA Part B funds can be used for activities that "directly relate to providing, and ensuring the continuity of, special education and related services to children with disabilities." *Id*.

Similarly with respect to Part C services, if the lead agency or EIS program or provider are closed, then Part C services are not required to be provided. *Id.* If offices are open but services cannot be provided in a certain location or by a certain provider, then the lead agency must ensure continuity of services. *Id.* Once the offices re-open, "the service coordinator and EIS providers for each child must determine if the child's service needs have changed" and decide whether the IFSP Team needs to meet to review and revise the IFSP. *Id.* "If offices are closed for an extended period and services are not provided for an extended period, the IFSP team must meet under 34 CFR § 303.342(b)(1) to determine if changes are needed to the IFSP and to determine whether **compensatory services** are needed to address the infant or toddler's developmental delay." *Id.* 

The Office for Civil Rights of the DOE advised that school districts "have significant latitude and authority to take necessary actions to protect the health, safety, and welfare of students and school staff. School officials have discretion to make educational decisions based on local health needs and concerns, and OCR recognizes this decision-making authority." *Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students* (OCR March 16, 2020). OCR advised schools to be mindful of the requirements of Section 504 and the ADA "to ensure that all students are able to study and learn in an environment that is safe and free from discrimination." *Id.* 

OCR indicated that for students on an IEP or Section 504 Plan who are at home for an extended period of time due to COVID-19 "provision should be made to maintain education services." *Id.* If school is open during such absences, "the school must ensure that the student continues to receive a free appropriate public education (FAPE)" consistent with protecting health and safety. *Id.* The IEP or Section 504 Team can assist "to determine if some, or all, of the identified services can be provided through alternate or additional methods" and accessible technology can be used to provide continuing education through distance learning. *Id.* Schools that close and do not provide services to the general student population are not required to provide services to students with disabilities during that same period of time. *Id.* Once school resumes, schools must return to providing services in accordance with the student's IEP or Section 504 Plan. *Id.* Recognizing that "exceptional circumstances" could affect how a particular service is provided, OCR directed that "[i]f a student does not receive services after an

extended period of time, the student's IEP Team, or appropriate personnel under Section 504, 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." *Id*.

Shortly after that guidance, OCR and OSERS issued new guidance to "address a serious misunderstanding" that some educators believed "federal disability law presents unsurmountable barriers to remove education. This is simply not true." Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (OCR/OSERS March 21, 2020). Compliance with IDEA, Section 504 and ADA "should not prevent any school from offering educational programs through distance instruction." Id. School districts must provide a FAPE consistent with the need to protect health and safety of students and providers, and the DOE recognized that exceptional circumstances may affect how all educational services are provided that may require "flexibility where possible." Id. "[P]rovision of a FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically." Id. The DOE recognized that schools "may not be able to provide all services in the same manner they are typically provided" like hands-on related services. Id.

"It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities" and "[t]he determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency." *Id*.

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 (as noted in the March 12, 2020 guidance) must make an individualized determination whether and to what extent **compensatory services** may be needed when schools resume normal operations.

*Id.* Parents, educators, and administrators were encouraged to collaborate creatively to continue to meet the needs of children with disabilities. *Id.* 

The IDEA's dispute resolution procedures remained intact and available to resolve disagreements, but the DOE continued to encourage timely and creative communication and collaboration to resolve disputes during the pandemic. *IDEA* 

Part B Dispute Resolution Procedures (OSERS/OSEP June 22, 2020); IDEA Part C Dispute Resolution Procedures (OSERS/OSEP June 22, 2020). Recognizing that during the pandemic "schools may not be able to provide all services in the same manner that they are typically provided" the DOE continued to encourage parents, educators and administrators to collaborate creatively to continue to meet students' needs. "Timely communication between parents and public agency staff can often help resolve disagreements that may arise regarding the educational services provided to a child with a disability during the pandemic." Id. When informal efforts are not successful, all dispute resolution mechanisms remain available including mediation, state complaints and due process hearings. Id. State complaint and hearing timelines may be extended on a case-by-case basis, and procedures may be accessed virtually. Id.

However, OSEP reminds SEAs and LEAs that no matter what primary instructional approach is chosen, SEAs, LEAs, and individualized education program (IEP) Teams remain responsible for ensuring that a free appropriate public education (FAPE) is provided to all children with disabilities.

*Id.* (emphasis supplied). If in-person instruction is limited or not provided, school districts and IEP Teams "are not relieved of their obligation to provide FAPE to each child with a disability under IDEA." *Id.* Every effort must be made to continue to provide special education and related services appropriate to the needs of each child. *Id.* ESY services "are prospective and not intended to make up for past denials of FAPE." *Id.* 

Decisions about "how and when educational and other services are provided" must account for "continued academic growth" and community safety. *IDEA Part B Service Provision* (OSERS/OSEP September 28, 2020). Multiple options to deliver instruction should be considered, including remote/distance, inperson, or a combination or hybrid approach. *Id*.

The DOE advised that State- or district-wide decisions that specifically reduce or limit services for students with disabilities, without regard to their individualized needs, violates Section 504. *Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment* (OCR September 28, 2020). "[F]ailure to implement aids, services, or accommodations/modifications identified in a student's IEP or Section 504 plan could deny the student a FAPE, violating Section 504. However, not every failure to implement an

accommodation/modification in an IEP or Section 504 plan constitutes a denial of a FAPE." *Id.* OCR will consider all relevant circumstances in evaluating implementation "including the impact that any discrepancies from an IEP or Section 504 plan have on the student's ability to participate in or benefit from the school district's services, program, and activities." *Id.* Timely evaluations are still required during distance learning subject to mutual agreements to waive or postpone timelines. *Id.* Temporary shifts to distance learning do not require changes or updates so long as a FAPE continues to be provided. *Id.* Individualized determinations must be made about revisions to IEPs or Section 504 plans to ensure provision of a FAPE. *Id.* Parents may not be required to waive any rights under Section 504 as a condition of receiving a FAPE. *Id.* 

During remote learning each student's IEP or Section 504 Team must make an individualized determination "on whether, due to remote learning, the student needs adjustments to the special education and related services . . ." *Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment* (OCR, May 13, 2021). It is not discriminatory to prioritize students with disabilities or others for whom remote learning is particularly challenging in returning to in-person instruction. *Id.* Students who cannot wear a mask or wear one safely because of their disability "should not be required to wear one." *Id.* Those students are still entitled to a FAPE "which might need to be provided remotely." *Id.* 

With passage of the American Rescue Plan of 2021 schools have significant federal resources available to meet student needs related to COVID-19. *Strategies for Using American Rescue Plan Funding to Address the Impact of Lost Instructional Time* (<a href="https://www2.ed.gov/documents/coronavirus/lost-instructional-time.pdf">https://www2.ed.gov/documents/coronavirus/lost-instructional-time.pdf</a>) (OSERS/OSEP August 2021). This guidance highlights the most effective, evidence-based strategies to support continuous improvement. Topics focus on:

- Reengaging students by building trust with families, supports during key transitions, using community partnerships to support reengagement, and addressing student social, emotional, mental health and academic needs
- Supporting parents in their child's success, engaging and communicating with families including expanding home visits, and sharing data and resources with families
- Using high-quality assessments to support learning, using assessments, and supporting educator assessment literacy and development

*Id.* The guidance includes resources to support educators in efforts to address the impact of COVID-19 on students. LEAs must reserve at least 25% of ARP ESSER funds to address the impact of lost instructional time through implementation of evidence-based interventions; ensure that interventions respond to social, emotional, mental health, and academic needs; and address the disproportionate impact of COVID-19 on identified populations, including students with disabilities. *Id.* "Cultivating clear, open, and honest communication pathways from all educators and staff invites greater opportunity for dialogue about what families and students need." *Id.* 

The science of learning has established that adverse experiences can have profound effects on students, but that "learning environments and conditions can be designed in culturally responsive ways that can help students overcome these effects and thrive." Id. This research can assist with "strategies for acceleration to address lost instructional time." Id. "Rebuilding from COVID-19 is an opportunity to reexamine and strengthen school policies and practices to assure families that school will reopen equitably for all students." Id. Educators must be prepared to respond to "student social and emotional needs and the mental health crisis facing students as they cope with the COVID-19 pandemic." Id. "It is particularly important to reengage those students who had the least opportunity to engage in virtual learning, missed the most instruction, and were least engaged by their schools prior to and during the pandemic, and to ensure those students receive the social and emotional supports that they need to succeed academically." Id. Tailored acceleration to differentiate instructional pathways can "get them back to grade-level and beyond as fast as possible" by "adhering to the principles of high expectations, rigorous accountability, and educational equity." Id. Accelerated learning opportunities during school breaks can result in significant gains in student performance. Id. Acceleration rather than **remediation** can be an effective way to address student's disrupted learning. *Id.* 

"Implementing evidence-based tutoring practices is a key approach to accelerating learning." *Id.* **Tutoring** is most effective when:

- Trained educators are tutors:
- High dosage tutoring is provided each week (daily or at least three sessions per week of at least 30-50 minutes works best);
- Tutoring is conducted during the school day whenever possible;
- Attendance and focused worktime with high-dosage tutoring are emphasized during out-of-school tutoring; and

• Tutoring is aligned with an evidence-based core curriculum.

*Id.* Providing opportunities for more adults in classrooms can enhance opportunities for break-out sessions to better facilitate differentiated instruction. *Id.* 

Equitable and individualized determinations of recovery services for students with disabilities can include **ESY services, general education recovery services, revised IEP services, and COVID-19 compensatory services**. *Id.* Any or all four methods could be utilized depending on the Team's assessment of the student's learning losses and needs.

"Supporting parents and caregivers in their efforts to support their own child's learning is critical to addressing the impact of lost instructional time and increasing student success." Personal outreach, expanded home visits, community meetings, social media pages, parent training and consultation, and sharing data and resources with families can promote trust and support student learning. *Id.*High-quality assessments should be used to support student learning, including supporting educator assessment literacy and development. *Id.* 

The DOE issued two versions of Ed COVID-19 Handbook: Roadmap to Reopening Safely and Meeting All Students' Needs (OSERS/OSEP April 2021 and August 2021). The guidance focused on creating safe and healthy learning environments, addressing lost instructional time, and supporting educator and staff stability and well-being. *Id.* The DOE advised that accelerated learning is best addressed through instructional approaches, tutoring and expanded learning time. *Id.* "Learning acceleration focuses on quickly diagnosing gaps in critical skills and concepts that may impeded students from accessing grade-level coursework." Id. "Learning acceleration can take place before, during, or after school; on weekends; during school breaks; or over the summer." Id. The guidance addresses four approaches, each of which can be used in combination: in-school acceleration, tutoring programs, out-of-school time programs, and summer learning and enrichment. *Id.* Again, the emphasis is on acceleration rather than remediation or pull-out instructional practices. Id. Expanded days, weeks or **vears** can be considered to provide additional instruction time. *Id.* Again, highquality tutoring can be a particularly effective intervention if implemented in high dosages, by well-trained tutors, and conducted during the school day. Id.

Strong summer learning and enrichment programs, including camps, work-based learning or community services, can accelerate learning especially

for students most impacted by disruptions. *Id.* Such programs should provide high-quality instruction by a certified teacher with high academic time on task. *Id.* Programs should also be designed to meet the social and emotional needs of students, and be engaging and enriching. *Id.* Accelerated learning strategies "are supplemental instruction and cannot replace a program of special education and related services based on a student's IEP and the decisions of the IEP Team." *Id.* "[I]nclusion of students with disabilities in district or schoolwide interventions to address lost instructional time does not relieve a district of its responsibility to make individualized decisions required under the IDEA about needed special education and related services for a student with a disability." *Id.* Students with disabilities "might be entitled to additional instruction and services, often referred to as **compensatory education services** to make up for any skills that might have been lost if it is individually determined that the student was unable to receive FAPE, as a result of the closure of school buildings or other disruptions in services during the COVID-19 pandemic." *Id.* 

Students with disabilities are entitled to "receive all of the education benefits provided by technology in an equally effective and equally integrated manner as their peers." *Id.* 

Some LEAs have reported difficulty consistently providing the services necessary to meet the child's needs and address each of the goals in the IEP. *Return to School Roadmap: Development and Implementation of IEPs* (OSERS, September 30, 2021).

As a result, some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals. 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.

Overall, the Department encourages IEP Teams to focus on the individual needs of the child, whether the child received appropriate services, and how additional services may support the child to make progress in light of the child's unique circumstances. This includes ensuring that the instructional methodology for delivery (e.g., in -person, virtual, hybrid), timing, frequency, service setting, and location of such services, including any necessary transportation services, appropriate support the child with a disability under Part B of IDEA in achieving the functional and academic goals set out in the child's IEP.

*Id.* It is "critically important that the IEP Team also consider any adverse impacts of the COVID-19 pandemic on each child with a disability" including whether the child has new or different needs than before the pandemic. *Id.* Consider revising IEPs to address –

- (1) Lost skills or a lack of expected progress towards attaining the child's annual IEP goals and in the general curriculum at the end of the 2020-21 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 methods 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.

*Id.* An IEP Team may also "review the measurable annual IEP goals to reflect a decline in the child's knowledge and skills resulting from the disruption in instruction . . ." *Id.* 

The DOE defined the term **compensatory services** as follows:

Under IDEA, courts have recognized compensatory services as an equitable remedy to prospectively address the past failure or inability of the LEA to provide appropriate services, including those that were identified on the child's IEP. That is, courts have ordered such services to address the child's needs after a failure or inability to provide FAPE over a given period of time. Likewise, the State complaint procedures provide for compensatory services as an available remedy when the SEA has found a failure or inability to provide appropriate services under IDEA in order to address the needs of the child.

*Id.* Because the IDEA and regulations are silent about who makes the compensatory education determination, the DOE advised LEAs to consult attorneys and "be transparent about the relevant legal standards that IEP Teams must use to determine a child's need for, and the extent of, **compensatory services.**" *Id.* Absent controlling authority, IEP Teams could consider the following, among other factors:

- Present levels of academic achievement and functional performance;
- Previous rate of progress toward IEP goals; and
- Documented frequency and duration of special education and related services prior to service disruptions.

*Id.* The objective is to determine "the services needed to achieve the appropriate level of progress" and the timeline for achievement. *Id.* **Compensatory services** may be "necessary to mitigate the impact of disruptions and delays in providing appropriate services" i.e., delays in evaluations, identifications, development or implementation of an IEP; if services provided during the pandemic were not appropriate to meet the child's needs; if some or all of the IEP could not be implemented with methods of service delivery available; and if meaningful transition services were not provided. *Id.* 

States must ensure a FAPE to all children and so must ensure that compensatory services are available to all IDEA-eligible students who need them due to service disruptions. *Id.* IEP Teams are empowered to make individualized determinations about student needs and considering **compensatory services** is a subset of that role. *Id.* "A determination of **compensatory services** by the child's IEP Team is an appropriate proactive mitigating measure intended to address the needs of the child due to the LEA's failure or inability to provide appropriate services." *Id.* Such determinations, if consistent with IDEA requirements and based on sound judgment of school authorities, may receive deference from a court if challenged. *Id.* Each SEA has general supervisory responsibilities, and must ensure the LEAs "take appropriate action to mitigate the adverse impact of any

failure to provide appropriate services, such as lost skills and lack of progress, for children with disabilities." *Id.* If "recovery services" or "COVID mitigation services" are not based on individualized determinations "of each child's unique needs and circumstances, such services likely would not be considered **compensatory services**." *Id.* Children who have graduated or exceeded the age of eligibility for IDEA services can be provided **compensatory services** through an additional period of eligibility. *Id.* 

The DOE also advises that students eligible under Section 504 continued to have the right to appropriate evaluations and services during the pandemic, including the right to compensatory services to make up for lost instruction. Fact Sheet: Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory Services Under Section 504 (OCR, February 16, 2022). To ensure a FAPE, schools must convene student 504 Teams "to make an individualized determination of whether a student's current services should be changed due to the effects of the COVID-19 pandemic, such as the impact of loss of services on skills, mental health and trauma concerns, or the physical health effects of long COVID (post-COVID conditions)." *Id.* If students did not receive appropriate evaluations or services, including those the school previously determined they needed, then the 504 Team must decide whether and to what extent **compensatory services** are required. Id. The "compensatory services inquiry requires looking backwards to determine the educational and other benefits that likely would have accrued from services the student should have received in the first place." Id. Providing compensatory services "does not draw into question a school's good faith efforts during these difficult circumstances. It is a remedy that recognizes the reality that students experience injury when they do not receive appropriate and timeline initial evaluations, re-evaluations, or services, including the services that the school had previously determined they were entitled to, regardless of the reason." Id.

#### A. Enhanced Individualized Education Programs

Providing enriched and extended opportunities to make up for lost progress during the regular school day has benefits and detriments. Because learning can be difficult for many students with disabilities, sometimes exhausting, compressing additional compensatory instruction into the school day relieves them of the need for extended day or extended school year commitments. Students have time after school commitments to do other activities that are equally important to child development and satisfaction. On the other hand, compacting additional instruction into the current IEP may require a sacrifice of opportunities during the

school day for non-academic, elective, less rigorous, or more inclusive activities that could otherwise be enjoyed.

#### **B.** Enhanced Extended School Year Programs

Providing enriched and extended opportunities to make up for lost progress over breaks in programming, such as summers, also has benefits and detriments. ESY is required to ensure the provision of a FAPE and is generally designed to maintain skills or improve skills critical to self-sufficiency. Benefits of enhanced ESY programs include the capacity to spread out remedial instruction over summers to maximize maintenance of skills and to best serve students with limited tolerance for compressed instruction during the regular school year.



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### Procedural Issues in Moves Between In-Person and Virtual Instruction

### Major Process Questions

Were wholesale moves of all students from inperson instruction to virtual instruction due to COVID school closures changes in placement under IDEA?

Are individual students' moves from in-person instruction to virtual programs a change in placement under IDEA?

What about from virtual to in-person?

### First OSEP Guidance (March 12, 2020)

• If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is the action a change in placement?

Yes, if the exclusion will be longer than 10 consecutive school days

Change of placement procedures through the IEP team (or placement team under 34 C.F.R. §300.166) must be undertaken, and prior written notice issued. (Question A-4).

• If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is the action a change in placement?

Parents retain all rights to challenge change in placement.

For §504 students, the change in placement must be in accordance with §504 regulations (504 committee reevaluation meeting, parent notice, parent procedural safeguards). (OSEP Guidance of March 12, 2020—Question A-4).

### Are Changes to At-Home Services Changes in Placement?

"If the exclusion is a temporary emergency measure (generally 10 consecutive school days or less), the provision of services such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available, is not considered a change in placement. During this time period, a child's parent or other IEP team member may request an IEP meeting to discuss the potential need for services if the exclusion is likely to be of long duration (generally more than 10 consecutive school days). For longterm exclusions, an LEA must consider placement decisions under the IDEA's procedural protections of 34 CFR §§300.115-300.116, regarding the continuum of alternative placements and the determination of placements." Question A-4 (OSEP Guidance March 2020).

### Question—Aside from individual COVIDrelated exclusions, does this guidance apply in general school closure situations?

In other words, in the case of a general closure, is the move to at-home/virtual services a change in placement with respect to every IDEA student?

It certainly would have been helpful for the guidance to answer this question, as it has led to different interpretations...

## • N.D. v. State of Hawaii DOE, 54 IDELR 111 (9<sup>th</sup> Cir. 2010)

Court addressed Hawaii's "furlough Fridays" where no classes were held on Fridays, including for sp ed students, for some time, due to budgetary issues

Court addressed the argument that these were changes in placement violating stay-put

Court noted that Congress did not seem to have intended the "stay-put" provision to apply to systemwide administrative decisions.

## • N.D. v. State of Hawaii DOE, 54 IDELR 111 (9<sup>th</sup> Cir. 2010)

But it also stated that "we conclude that under the IDEA a change in educational placement relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction."

It noted that in the case, the students remained in their exact classes and settings, just one day less per week.

## • N.D. v. State of Hawaii DOE, 54 IDELR 111 (9th Cir. 2010)

On the other hand, it also stated that "an across the board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out. In comparison to cases in which a child is singled out in relation to her peers, the furlough days do not remove the plaintiffs from the regular classroom setting anymore than they do the other children."

## • N.D. v. State of Hawaii DOE, 54 IDELR 111 (9<sup>th</sup> Cir. 2010)

Note—That last statement would appear to apply to the COVID closure situations, as IDEA students were not "singled out" to receive online services.

But, the situation in Hawaii was different than the changes caused by the school closures, which definitely involved changes in setting, program, LRE, amount of services, etc...

• If a child is excluded from school due to being ill, infected, or at high risk due to COVID, is the action a change in placement?

State education agencies (SEAs) have taken the position that general whole-district moves to virtual due to COVID closures are **not** changes in placement

By means of different arguments...

Note—Certainly, it would appear necessary to at least either engage in IEP amendments or develop some form of continuous learning plan, as some states have advised

The means to afford parent participation within the framework of IDEA in this shift remains unclear...

• What about individual student moves between in-person and virtual instruction?

Clearly, these would be changes in placement under IDEA.

Require IEP team action (or perhaps IEP amendment process) and prior written notice (PWN). See OSEP Return to School Roadmap (September 30, 2021).

Placement decision would be subject to the LRE requirements, and certain IEP components may need revision in light of the change in setting.

### Substantive Issues in Virtual Placement

 Thoughts on Voluntary Continuation of Online Instructional Options

Is virtual/online instruction a parent option or an IEP placement decision on a particular setting within the continuum of school placements?

Better answer is that online instruction is a setting within the continuum of placements, and therefore determined by the IEP team.

Why? Setting may not be appropriate for all IDEA students (as is the case with all settings...)

#### • Factors Relevant to Appropriateness of Online Option

Non-medical attendance problems or school avoidance

Ability to remain on task with minimum prompts

Social skills deficits requiring live interaction with other students

Need for significant one-to-one instruction

Need for significant life-skills instruction

Ability to work independently

Self-motivation skills

\*Previous performance in virtual programs

Ability and willingness of parents to play supervisory role

Need for alternate schedule

Compliance problems

Emotional problems

Academic ability

Ability to work with technology (with training and support)

### Declining Virtual Program Placement

Agreeing to a placement that is likely inappropriate due to the unique nature of the student's disabilities will likely generate problems:

- Lack of progress (for various reasons)
- Parent requests for at-home in-person services
- Difficulties moving student back to school

Note—IEPT could do a trial placement for a defined period, after which a permanent placement decision is made...

# Students/Parents Reluctant to Return to Live Instruction

#### Students with underlying medical conditions

Thus, IEP teams will have to decide how such students are to access instruction, in consideration of relevant factors:

- Information from child's physician and parent
- Student performance in remote learning option
- Type and severity of underlying condition
- Whether school requires students to wear masks
- Feasibility of safety precautions at school
- Position of local health authorities
- LRE considerations

# Students/Parents Reluctant to Return to Live Instruction

### • Students with underlying medical conditions

States could set up standards and procedures by which schools make such decisions, if there are concerns over consistency in decision-making.

Refusal to consider remote learning options for students with CDC-recognized underlying risk conditions would likely be a violation of IDEA and §504 (failure to provide accommodations and appropriately safe placement)

 Students without underlying medical conditions, but whose parents have health and safety concerns

IEP teams will have to decide the issue as a FAPE and placement matter—a balancing of FAPE, LRE, and health considerations.

Note—Certainly we can agree that health and safety are in fact FAPE-related matters (e.g., precautions for students with nut allergies, diabetes services, etc...)

 Students without underlying medical conditions, but whose parents have health and safety concerns

Difficult situations—parents adamantly oppose return to live instruction, but progress and participation data indicate student did not perform well in remote instruction...

Are IEP teams that agree to virtual in these situations setting themselves up for future denial-of-FAPE/comp claims?...

 Students without underlying medical conditions, but whose parents have health and safety concerns

Thankfully, these problems should lessen as more and more counties in the U.S. fall into CDC's "low risk" classification and infection/transmission rates wane.

## COVID Comp—March 2020 OSEP Guidance

 What if schools are forced to miss services or instruction required under IEPs or 504 plans?

At various points, the guidance indicates that IEP teams and 504 committees will need to consider students' potential need for **compensatory services** if services are missed. (Questions A-1, A-2, A-3).

Q & A on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (USDOE March 12, 2020), at Questions A-1, A-2, A-3.

• What if schools are forced to miss services or instruction required under IEPs or 504 plans?

Note—Thus, USDOE recognizes that it might not be possible to provide full FAPE services to students during a school closure, but schools can "make up" FAPE shortfalls when school reopens.

Question is how will courts and HOs interpret the expectation of IEP implementation "to the greatest extent possible"? How will they calculate comp?

#### • What are compensatory services?

"Compensatory education is an appropriate means for providing a FAPE to a child with disabilities who has previously been denied FAPE." Letter to Anonymous, 21 IDELR 1061 (OSEP 1994).

In COVID context, the reason for school closure is beyond districts' control, so we can call this "COVID Comp" to distinguish it from denials of FAPE where districts are at fault.

Some states and districts are giving this remedy different names altogether (recovery services, supplemental COVID services, etc...)

## Issues in COVID Comp Services

#### OSEP Roadmap Comp Guidance

Curiously, OSEP first states the law is not clear as to who makes the COVID comp determination, but then indicates schools should consult their attorneys "about the relevant legal standards IEP teams must use..."

Note—In another part of the Roadmap, OSEP states that it is the longstanding position of USDOE that IEP teams make comp services decisions (see Question D-7).

## Issues in COVID Comp Services

 COVID comp determinations will require addressing complicating factors

One complicating factor will be parents who have failed to take advantage of online services, and whether that should weigh against providing compensatory services.

Another is that some students may have struggled in engaging with remote instruction due to their disabilities.

### Deciding the COVID comp questions will require addressing complicating factors

To Federal Courts, since comp services is an equitable (fairness-based) remedy, a parent's conduct, such as refusing services, is relevant in determining comp services.

See, e.g., *Parents of Student W. v. Puyallup Sch. Dist.* #3, 32 F.3d 489 (9<sup>th</sup> Cir. 1994)(Parent's rejection of eligibility, refusal to allow behavior specialist, rejection of summer services in two years, influenced comp services calculation.)

#### Deciding the COVID comp questions will require addressing complicating factors

See, e.g., Garcia v. Board of Educ. of Albuquerque Pub. Schs., 49 IDELR 241 (10<sup>th</sup> Cir. 2008)—
Despite FAPE violation, Court declined to award comp services because student had failed to take advantage of services previously offered and parent avoided meetings to develop IEPs.

Court: "the limited resources devoted to providing education benefits for disabled children are not effectively allocated where schools expend resources on students who not only fail to use the educational opportunities provided them but also affirmatively avoid attending school altogether."

 Deciding the COVID comp questions will require addressing complicating factors

See also, *T.B. v. Prince George's County Bd. Of Educ.*, 72 IDELR 171 (4<sup>th</sup> Cir. 2018)—Despite failure to timely evaluate, comp services denied since student was unwilling to attend school under any circumstances.

See also, C.H. v. Cape Henlopen Sch. Dist., 54 IDELR 212 (3<sup>rd</sup> Cir. 2010)(lack of parental cooperation); M.M. v. School Dist. of Greenville Cnty., 37 IDELR 183 (4<sup>th</sup> Cir. 2002)(parents would have refused any FAPE offer).

 Hutto Ind. Sch. Dist., 121 LRP 13473 (SEA Texas 2021)

A Texas school made extensive efforts to work with the parent of a student with SLD, ADHD, and SI during the COVID school closure period.

Nine IEP meetings were held, various efforts were made to keep student engaged with virtual learning, weekly home visits.

#### Hutto Ind. Sch. Dist., 121 LRP 13473 (SEA Texas 2021)

Student made progress, earned passing marks, mastered all IEP goals, became less distracted, and showed progress in his dyslexia program.

Parents, believing that student should be reading and writing at grade level, sought compensatory services.

Although arguably the student did not need comp, IEPT offered comp in reading and speech—parents refused and did not take advantage of services.

### Hutto Ind. Sch. Dist., 121 LRP 13473 (SEA Texas 2021)

HO held that the student received meaningful benefit despite not achieving grade level performance, as performance on par with nondisabled students is not required under IDEA.

Moreover, she held that parents' claim for comp was "undermined" by the fact that they actually declined the school's offers of comp in reading and speech.

# Calculating Comp—The Qualitative vs. Quantitative Analysis

A quantitative analysis mathematically calculates the missed amount of services and awards that amount as comp services.

A qualitative approach looks at lost skills or progress and provides the services necessary to place the student where they should be in terms of performance if there had been no interruption in FAPE.

#### Qualitative vs. Quantitative Analysis

The qualitative analysis is more favored by the federal courts, who are required to fashion appropriate relief for IDEA litigants on an individualized basis, rather than with mathematical formulas.

Branham v. District of Columbia, 44 IDELR 149 (D.C.Cir. 2005)—Applying qualitative analysis, noting that a quantitative "cookie-cutter approach" could "not be squared with IDEA's conferral of equitable authority to grant such relief as the district court determines is appropriate."

#### Qualitative vs. Quantitative Analysis

See, e.g., Somberg v. Utica Comm. Schs., 118 LRP 45495 (6<sup>th</sup> Cir. 2018)(Court reduced comp services award because data indicated student made some progress despite the finding of denial of FAPE).

Note—A quantitative award of large amounts of comp services could be too much for students to handle, under certain circumstances. See, e.g., Denver Pub. Schs., 121 LRP 43006 (SEA CO 2021) ("a minute for minute calculation for all services missed would be burdensome on Student.")

Qualitative vs. Quantitative Analysis

Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.2d 1489 (9<sup>th</sup> Cir. 1994)—"There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA."

#### Issue of Natural Recoupment

What if a student quickly regains educational losses after school reopens?

One would think that natural recoupment, if present, should impact the COVID comp determination.

But, some weeks of return to school instruction might be necessary before IEP teams can ascertain if any losses have been naturally recouped. Will that be legally tolerable?

#### Caselaw Example on Point

Smith v. Cheyenne Mountain Sch. Dist. 12, 72 IDELR 173 (D. Colo. 2018). Although the child had some deficits when he first returned to school after a two-month absence, test results showed that he regained those lost skills within days. Those test results, along with teacher testimony and the child's aboveaverage grades on report cards, showed that the child had no need for compensatory education.

Probably best for IEP teams to consider COVID comp, if:

- Initial evaluations indicating eligibility were delayed
- Any services were missed during closure
- Student failed to make anticipated progress
- Student failed to engage fully in virtual
- Parents request comp

Note—OSEP Roadmap states that comp services may be necessary even if students have graduated. See Question D-10 (citing a number of federal court decisions to that effect).

Or, some districts may decide to have COVID comp IEP meetings on *all* students

If there is data indicating student failed to make all anticipated progress in any area, best to find that COVID comp is warranted

Next step is calculation of comp, and determining how best to structure the services (afterschool, summer, increased services during the day, combination of preceding, etc)

Comp "package" should be set out with the same specificity as any IEP services

If parent declines comp, IEP should set forth comp "package" and indicate parent is declining at that time, but can access later

Cases disputing the schools' comp will focus on whether the comp "package" is reasonably calculated to put the student where they should have been if there were no COVID disruption.

#### Relevant factors:

- Present levels of performance
- Previous rate of progress
- Services provided prior to COVID disruption

See OSEP Return to School Roadmap, 79 IDELR 232 at Question D-5 (September 30, 2021).

Other factors that would seem relevant:

- Progress reports during COVID disruptions
- Whether student took advantage of services
- Reasons student failed to avail of services
- Whether recoupment has taken place at school