SPECIAL EDUCATION RECOVERY: WHAT ARE "COMPENSATORY EDUCATION SERVICES" AND HOW ARE THEY DETERMINED?

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I. INTRODUCTION

The issue of "compensatory education services" as a remedy for a denial of FAPE under special education laws has become a popular topic for discussion, particularly in light of national school closures and other interruptions to school operations necessitated by COVID-19 over the past 18 months. This session will examine the historical and legal origins of "compensatory education" as a legal remedy in special education cases, as well as its court-created definition and purpose. Relevant case law with respect to what form "compensatory education services" may take and how they are calculated will also be highlighted, in addition to the status of relevant court or hearing officer decisions issued on the topic. Finally, a suggested general framework for determining what "compensatory services" might look like for a student when assessing the overall impact of COVID-19 on FAPE will be provided and reviewed, in an effort to assist school teams that are struggling with the issue.[1]

II. WHY "COMPENSATORY EDUCATION" IS A HOT ISSUE

Before COVID, it was rare that "Comp Ed" was a hot topic for discussion in the special education legal world. However, the issue of "compensatory education services" immediately became a national hot topic when the U.S. Department of Education (U.S. DOE) mentioned "compensatory services" several times in March 2020 as a potential remedy for delays in providing services to students with disabilities because of COVID-19. Specifically, the U.S. DOE's Office for Civil

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[1] **Important Disclaimers:** The information I will provide today is the best that I know right now. It could change by the end of this Session and is intended as general information only. You must consult with your district's school attorney on specific, local matters and for legal advice. In addition, this information must be analyzed in light of your State DOE's (and/or your local district's) guidance on all things COVID and the provision of educational services, including "compensatory services," to students with disabilities.

Rights (OCR) and Office of Special Education and Rehabilitative Services (OSERS) stated in nonbinding informal guidance that:

> The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency....FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students. Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services – IEP teams must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.

Joint OCR/OSERS "Supplemental Fact Sheet," March 21, 2020, p. 2.[2]

Since the time that the above-referenced federal guidance was issued last year, much concern and confusion has been evident with respect to what the U.S. DOE meant when it referred to this thing it called "compensatory services." Indeed, when the U.S. DOE mentioned "compensatory services" in its guidance documents, it also stated that "an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE...would be required to make an individualized determination as to whether compensatory services are needed *under applicable standards and requirements*." "Q&A on Providing Services to Children with Disabilities," March 12, 2020 (emphasis added).[3] Unfortunately for school agencies and families alike, there actually are no "applicable standards and requirements" related to the provision of compensatory services for a school's failure or inability to deliver IEP-based special education and related services due to a global health and safety emergency, and at the time of the creation of these materials, the U.S. DOE has still failed to provide any clarity on what it meant by "compensatory services" in 2020 and how IEP teams might approach determining the need for them. [4]

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[2] This document can be found at: https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf.

[3] This document can be found at https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf. As an aside but important to note, a federal court in its dismissal of a FAPE COVID-related challenge to the closing of New Mexico's schools to in-person instruction concluded that the U.S. DOE's March 2020 guidance documents related to FAPE and COVID "are unpersuasive, because they lack thoroughness, valid reasoning, and consistency." In fact, the court pointed out that the documents themselves state that they "are not legally binding" and "do not have the force and effect of law and are not meant to bind the public." Hernandez v. Lujan Grisham, 78 IDELR 12 (D. N.M. 2020).

[4] On May 13, 2021, U.S. DOE's Office for Civil Rights (OCR) issued a Q&A document regarding reopening of schools in light of the requirements of Title VI of the Civil Rights Act of 1964 (race, color, national origin discrimination), Title IX (sex discrimination) and Section 504/ADA. In this

III. WHAT IS "COMPENSATORY EDUCATION?"

A. "Comp Ed" Defined

To have a better understanding of the overall Comp Ed issue related to COVID's circumstances, it is important to try to define what Comp Ed actually is. Under IDEA, there is no reference to or definition of "compensatory education" or "compensatory services." However, in the special education legal field, "Comp Ed" as it is generally known, is an equitable court-created remedy that is commonly ordered by courts against school districts for a past denial of FAPE to a student with a disability. It is important to note that Comp Ed does not replace a school district's obligation to provide ongoing FAPE to a student. Rather, it is designed to supplement what the student will receive via an appropriate IEP—typically going over and above what is currently appropriate—in order to place the student in the educational position he/she would have been had the denial of FAPE not occurred. In other words, it is a remedy that seeks to make a student educationally "whole."

B. The History of the Comp Ed Remedy

1. Comp Ed under IDEA

As indicated previously, the terms "compensatory education" and "compensatory services" are not mentioned in the language of IDEA.[5] For more than three decades, however, courts have been

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document, OCR provided general school reopening guidance via a Q&A format related to serving students with disabilities that is generally similar to what it has provided previously, addressing FAPE, mask exemptions, physical distancing, accessibility and placement questions. In addressing some FAPE questions, OCR noted that "[t]he Department is aware of important questions regarding compensatory services for students with disabilities and plans to address those in a separate guidance document." Q&A document, page 7. The Q&A document can be found at https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf. As of the date of my submission of these materials, I have not seen that this separate document devoted specifically to "compensatory services" has been issued. On August 24, 2021, however, U.S. DOE did issue "Strategies for Using American Rescue Plan Funding to Address the Impact of Lost Instructional Time" wherein the Department notes, among other things, that "[s]tates can also take important steps to support districts and schools in meeting the needs of students with disabilities, including following service disruption or changing service needs as students return to school." The Department specifically cites Minnesota and Washington guidance issued in 2021 that both provide information on determining the need for compensatory services. This recent DOE document can be found at https://www2.ed.gov/documents/coronavirus/lost-instructional-time.pdf.

[5] While the term "compensatory education" is not contained in the statute itself, "compensatory services" *are* mentioned in IDEA's regulations with respect to resolution of State Complaints filed under its provisions. Specifically, the regulations contemplate that in resolving a complaint in which the State Educational Agency has found a failure to provide appropriate services, the SEA must address the failure to provide the services, "including corrective action appropriate to address

ordering Comp Ed as a remedy in IDEA cases by exercising the express broad authority given to them under IDEA to grant any relief "that the court determines appropriate."

Specifically, the IDEA provides that—

> in any court action brought under IDEA for court review, a court is to receive the records of the administrative due process hearing proceedings, hear additional evidence at the request of a party and, basing its decision on the preponderance of the evidence, grant the relief that the court determines appropriate.

20 U.S.C. § 1415(i)(2)(C)(iii) and 34 C.F.R. § 300.516(c)(3).

2. The evolution of Comp Ed case law

a. Initial rejection of the Comp Ed remedy as a form of "damages"

One of the first courts to entertain a request for Comp Ed as a remedy was the Eighth Circuit Court of Appeals. In 1982, the Eighth Circuit held that even though the law provided for broad discretion to courts, Congress did not intend to create a private cause of action under the Education for all Handicapped Children Act (EHA – now IDEA) for the "damage relief" requested by the parents of a student with a disability, "including compensatory educational services." Meiner v. State of Missouri, 673 F.2d 969 (8th Cir. 1982). Thus, the case was dismissed in favor of the school district as a matter of law.

b. Equitable relief not considered "damages"

In 1985, the U.S. Supreme Court decided the case of Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359, 105 S. Ct. 1996 (1985). In Burlington, the parents of a student with a disability sought private school tuition reimbursement as a remedy for the school district's failure to offer an appropriate IEP for their child. The school district characterized the request for reimbursement for private school as one for "money damages" not allowable under the law, but the Burlington Court rejected that characterization and held that tuition reimbursement "merely requires [a district] 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." Noting that the statute directs courts to "grant such relief as it determines is appropriate," the Court held that the ordinary meaning of those words conferred broad discretion on courts and that the type of relief was to be "appropriate in light of the purpose of the Act," meaning that "equitable considerations are relevant in fashioning relief."

In 1986, the Meiner case went back to the Eighth Circuit on a renewed claim for compensatory education services. Based upon the Burlington decision, the Eighth Circuit reversed itself, noting that the Burlington Court "altered our understanding of what 'damages' includes in the context of

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the needs of the child (such as compensatory services or monetary reimbursement)." 34 C.F.R. § 300.151(b)(1).

the EHA…The plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate public education in violation of the EHA." Meiner v. State of Missouri, 800 F.2d 749 (8th Cir. 1986). Courts and hearing officers have been awarding Comp Ed as a remedy in IDEA cases ever since.[6]

c. Subsequent relevant Circuit Court Comp Ed rulings

i. Comp Ed awards after student has aged out of FAPE entitlement

In 1990, the Third Circuit Court of Appeals entertained the notion of awarding Comp Ed beyond a state's statutory age maximum (usually 21 or 22). In Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), the Court affirmed a district court ruling that awarded the student two and one-half years of Comp Ed beyond age 21, noting that all the court did was to "award Lester the number of years needed to restore that which concededly had been denied him and to which he is entitled…." Thus, the district's position that the student was not entitled to any relief because he had "aged out" was rejected, and awards for Comp Ed after a student has aged out have been occurring in special education cases ever since.

ii. Comp Ed as an automatic award when services not provided

In 1994, the Ninth Circuit Court of Appeals addressed the important question of whether an award of Comp Ed should be an automatic remedy when a court finds that required services have not been provided to a student with a disability. In Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489 (9th Cir. 1994), the Court found that although the student had "unquestionably" lost time during his eighth and ninth grade school years when he was not receiving special education services, "compensatory education is not a contractual remedy, but an equitable remedy" and there was no showing that the general award of unspecified one and one-half years of compensatory education sought by the student was appropriate.

Notably, the Court held that "[t]here is no obligation to provide a day-for-day compensation for time missed. Rather, the court found, appropriate relief under the law is designed to ensure that the student is appropriately educated. Noting that Student W. was able to graduate from high school before reaching age 21 without more services than provided for in his annual IEP, the Ninth Circuit concluded that the "IDEA promises him no more." On that basis, the Court concluded that the district court did not abuse its discretion when it denied compensatory relief to Student W.

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[6] In 1991 and based upon existing case law at the time, the U.S. DOE aligned its views on Comp Ed with the courts and opined that it was an appropriate remedy for a denial of FAPE, noting that it might be the only means for providing FAPE to children who have been forced to remain in inappropriate placements pending litigation because of their parents' financial inability to pay for private placements. Letter to Kohn, 17 IDELR 522 (OSERS 1991). At the same time, U.S. DOE also noted that hearing officers, like courts, also have the authority to order Comp Ed as a remedy when it is found that FAPE was denied in due process proceedings.

iii. Bad faith or "flagrant disregard" on the part of the school district

In 1995, the Third Circuit addressed the issue of whether bad faith or "flagrant disregard" of IDEA on the part of school district personnel is required for an award of Comp Ed. In Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995), the Court noted that while it had held that Comp Ed is an available remedy to respond to situations where a school district flagrantly fails to comply with IDEA, "we do not believe that bad faith is required" for a Comp Ed award. However, in so noting, the Court also emphasized that "most cases awarding compensatory education involved quite egregious circumstances. This case does not appear to be in that category." The Court found that there was no violation shown in the case and reversed the district court's order of six months of Comp Ed for an IEP that had not been challenged by the parents and was therefore "presumptively appropriate." Until this decision was issued, it generally appeared that a Comp Ed award required egregious conduct on the part of the school district. See, e.g., Garro v. State of Conn., 23 F.3d 734 (2d Cir. 1994) and French v. New York State Dept. of Educ., 57 IDELR 241 (2d Cir. 2011) (unpublished).

iv. Vigilance on the part of parents

In addition to the Third Circuit's comment about a parent's failure to object to or challenge an IEP making it "presumptively appropriate," a shift began to occur in 1996 when the Third Circuit decided M.C. v. Central Region Sch. Dist., 81 F.3d 389 (3d Cir. 1996) and directly addressed whether a parent's failure to object to an inappropriate IEP would bar an award of Comp Ed. Specifically, the Court ruled that a parent's failure to object to an inappropriate IEP generally has no bearing on a compensatory education award. Importantly, the Court noted that its holding could be summarized as follows:

> [A] school district that knows or should know that a child has an inappropriate IEP or is not receiving more than a *de minimis* educational benefit must correct the situation. If it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem. We believe that this formula harmonizes the interests of the child, who is entitled to a free appropriate education under IDEA, with those of the school district to whom special education and compensatory education is quite costly.

The M.C. Court recognized that the case against the school district would have been "stronger" had the district actually known of the educational deficiency or the parents had complained. However, the court noted that "a child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith." Rather, the Court noted, "it is the responsibility of the child's teachers, therapists and administrators and of the multi-disciplinary team that annually evaluates the student's progress to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly."

The M.C. Court remanded the case back to the district court and directed the court to determine when the school district knew or should have known that the student's IEP was inappropriate or

that the student was not receiving more than *de minimis* educational benefit. In addition, the court was directed to define the "reasonable time" within which the district should have done something about it. After doing all that, "compensatory education should accrue from that point forward."

IV. HOW DO COURTS DETERMINE HOW MUCH COMP ED TO AWARD?

As the entitlement to Comp Ed as a remedy became clear in the Circuit courts in the 1990s, the issue then became (and still continues to be) how much Comp Ed is to be awarded when there has been a denial of FAPE and the method for calculating it. In light of relevant court decisions, several apparent methods for determining an appropriate compensatory education award have evolved: (1) A quantitative or "tit-for-tat" method; (2) a qualitative or "needs-based" method; and (3) a "hybrid" or combined method. Each is discussed below but all can collectively be characterized as individualized and "dependent upon the circumstances."

A. The Quantitative Approach

The quantitative and perhaps "easier" approach to calculating Comp Ed is to use a "tit-for-tat" approach for calculating an award of Comp Ed. While most courts have rejected the use of this approach, some appear to approve of its use. See, M.C. v. Central Regional Sch. Dist., supra. The "hour-for-hour" approach has also been met, however, with increasing scrutiny by hearing officers and courts, which has led to the creation and adoption of the qualitative approach, even by the Third Circuit in a subsequent case. See, G.L. v. Ligonier Valley Sch. Dist. Authority, 802 F.3d 601 (3d Cir. 2015). Interestingly, I have seen this approach used more often in settlement negotiations between families and school districts, even though it is not embraced by most of the courts.

B. The Qualitative Approach

As indicated previously, the Ninth Circuit in Parents of Student W. v. Puyallup, supra, held that Comp Ed awards are not to be based upon a one-to-one correspondence with services not provided. In 2000, the Eighth Circuit also noted that the student at issue might actually be entitled to more than just one year of compensatory education because "the optimum time for language acquisition is at a younger age than Lauren's present age." Strawn v. Missouri Bd. of Educ., 210 F.3d 954 (8th Cir. 2000). In other words, a year of services lost could require more than a year of Comp Ed to make the student whole, depending upon the needs of the student.

In 2005, an often-cited case was decided by the D.C. Circuit Court of Appeals. In Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005), the Court specifically adopted a "qualitative" or needs-based approach to calculating an award of Comp Ed, reasoning that such an award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." Here, the Court noted that a 16-year-old student with severe learning disabilities was entitled to Comp Ed for the district's failure to provide him with appropriate instruction during his four years of high school. In doing so, however, the Court rejected a hearing officer's 810-hour award that was based on one hour of compensatory education for each day the district denied the student appropriate instruction. In addition, the Reid Court rejected the parents' request for hour-per-hour Comp Ed,

noting that this "cookie-cutter approach" runs counter to both the "broad discretion" afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce. Instead, the Court adopted a "qualitative approach," and instructed that "compensatory education awards should aim to place disabled students in the same position they would have occupied but for the school district's violation of IDEA."

The Reid Court remanded the case back to the district court and stated that "just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments." Based upon this increasingly more popular needs-based approach, a Comp Ed award may comprise fewer hours or even many more hours than those that were denied and may include an award for similar services or entirely different ones, depending on the needs of the student.

In viewing how courts have applied the qualitative approach, it appears that this approach requires much more of a burden upon parents and their attorneys with respect to what evidence they will need to show. At a minimum, they will need to show:

- That a denial of FAPE occurred;
- What actual effect the denial of FAPE had on the student's educational needs and performance;
- What the educational needs and performance of the student would likely have been had the denial of FAPE not occurred; and
- What program and services are necessary to make the student whole.

C. A Hybrid or Combined Approach

In looking at the voluminous amount of Comp Ed case law that exists today, it generally appears that most courts have adopted either the qualitative, needs-based approach or a more flexible or less definitive approach to calculating awards of Comp Ed. (and some have not made up their minds). For example, the Ninth Circuit Court of Appeals seems to have adopted an approach that falls somewhere in between the quantitative approach and the qualitative approach at times. See, Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025 (9th Cir. 2006). But see, R.P. v. Prescott Unif. Sch. Dist., 631 F.3d 1117 (9th Cir. 2011) where the Court in dicta appears to endorse the use of the qualitative approach.

V. MISCELLANEOUS COMP ED ISSUES

A. Comp Ed for a Student who Moves Out of the District

The fact that a student has moved out of the school district does not mean that the student is no longer entitled to a Comp Ed award from that district. In other words, a student's move to another district or state does not render a claim for Comp Ed for past denials of FAPE moot. See, e.g., D.F. v. Collingswood Borough Bd. of Educ., 59 IDELR 211 (3d Cir. 2012) and Letter to Anonymous, 75 IDELR 162 (OSEP 2019) [Once a family relocates to another state, the district is still generally responsible for providing any remaining compensatory services ordered by the SEA to the child and the SEA would be responsible for ensuring the district does so].

B. Comp Ed for a Student who has Graduated with a Regular Diploma

While a court may find that successful graduation with a regular diploma negates the need for a Comp Ed award, the U.S. DOE has indicated that graduation does not automatically relieve a school district of its responsibility to provide Comp Ed and related services that were previously awarded to the student based upon a denial of FAPE. Letter to Riffel, 34 IDELR 292 (OSEP 2000).

OSEP noted that nothing in IDEA limits the authority of an SEA to identify an appropriate remedy for a denial of FAPE, including an award of compensatory services, even where the student has elected to graduate with a regular high school diploma. According to OSEP, this is so because the purpose of a Comp Ed award is to remedy a failure to provide services that the student should have received and, like FAPE, can assist a student in the broader educational purposes of IDEA to participate in further education, obtain employment, and/or live independently. "The fact that a student has graduated or reached the age at which the right to FAPE would ordinarily end does not necessarily negate the relevancy of, and the need for, compensatory services."

C. Forms of Comp Ed Awards

Just as the courts have broad authority to order "appropriate relief" when a student has been denied FAPE, they also have broad authority in crafting Comp Ed awards. As a result, awards of Comp Ed come in many forms and vary from case to case.

In most cases, for students who have not aged out of eligibility for FAPE, Comp Ed will consist of the provision of immediate additional services or may be in the form of additional services to be provided in the future. For students close to or beyond the state's age of FAPE eligibility, Comp Ed often comes in the form of extending the provision of educational services to the student beyond age 21 (or whatever the state's "age out" may be).

While Comp Ed typically comes in the form of services ordered to be provided by the school district, courts have also ordered reimbursement for private services or even prospective payment for private school placement or other private services as Comp Ed for a denial of FAPE. Draper v. Atlanta Indep. Sch. Sys., 49 IDELR 211 (11th Cir. 2008), cert. denied, 131 S. Ct. 342 (2010) [nothing in IDEA precludes an award of compensatory education in the form of private school placement]. Courts have also been known to award parents Comp Ed in the form of costs related to future programming, including college programming. Streck v. Board of Educ. of the E. Greenbush Cent. Sch. Dist., 55 IDELR 216 (2d Cir. 2010), unpublished [costs related to son's reading program in college, as well as a laptop computer and reading-related software purchased for a college reading program ordered as compensatory education].

More recently, courts have also ordered districts to place sums of money into a "compensatory education escrow account" or trust fund for the future educational, rehabilitative, therapeutic or recreational benefit of a student with a disability. See, e.g., Doe v. East Lyme Bd. of Educ., 76 IDELR 233, 96 F.3d 649 (2d Cir. 2020) and G.M. v. Willingboro Twp. Sch. Dist., 70 IDELR 34 (D. N.J. 2017) [student entitled to $265,160 into a compensatory education trust fund representing 533 days without appropriate services (or 3,314.5 hours of services) at a rate of $80 per hour].

D. The Impact of Parent or Student Action (or Inaction) on Comp Ed Awards Even Where a Denial of FAPE Occurred

In some cases and even where a parent has shown that a denial of FAPE by the school district occurred, courts may find that parent or student conduct that interfered with the student's FAPE is germane to determining whether and how much Comp Ed to award. For example, in Parents of Student W. v. Puyallup School District, supra, the court held that the student was not entitled to an award of one and a half years of Comp Ed and reduced the award, noting that the student's parents had initially declined IDEA eligibility and later refused the district's offer of assistance from a behavior specialist and summer services for two years. See also, Garcia v. Board of Educ. of Albuquerque Pub. Schs., 49 IDELR 241 (10th Cir. 2008) [district court did not abuse its discretion to deny compensatory relief where student was truant for extended periods of time and would probably not take advantage of compensatory education anyway].

In a more recent case, the Fifth Circuit Court of Appeals affirmed a denial of compensatory education services in a case where it was found that the district did not timely evaluate a student when it waited seven months to evaluate the student for dyslexia and other learning disabilities. The Court affirmed the denial because the parents rejected several remedial services offered by the district as part of general education, including a dyslexia class, individualized tutoring and further evaluations. In addition, the parents stymied the efforts of the district to correct deficiencies in the student's initial IEPs by refusing to meet with the IEP Team while an independent educational evaluation was pending. P.P. v. Northwest Indep. Sch. Dist., 77 IDELR 7 (5th Cir. 2020) (unpublished). The fact that courts have considered these circumstances, parent or student action/inaction could be relevant in any future COVID-related FAPE cases that we may see.

VI. FAPE DENIALS THAT TYPICALLY WARRANT COMP ED AWARDS

Denials of FAPE that would warrant a Comp Ed award come in different forms of action or inaction on the part of the district. I generally see three kinds of FAPE failures that would warrant Comp Ed awards.

A. Failure to Appropriately and Timely Meet Child Find Requirements

Comp Ed is the primary form of relief sought in cases alleging a failure on the part of a school district to appropriately and timely locate, evaluate and identify a student with a disability. Often, these child find cases allege a denial of FAPE on behalf of a student who has been found eligible for special education services and is receiving them but was referred for an evaluation by the district in an untimely manner. Other cases may involve a finding that the district's evaluation was flawed, and its eligibility determination was in error as a result. Still others may allege that a process for locating, evaluating or identifying a regular education student was not initiated at all.

B. Failure to Offer an Appropriate IEP or Services/Placement

Most of the Comp Ed cases focus on whether the IEP provided by the school district was appropriate for the student. Based upon Supreme Court authority, the general analysis for determining IEP appropriateness is a two-fold determination of 1) whether the IEP was developed

in accordance with IDEA's required procedures and, if so, 2) whether the IEP is reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances. Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982) and Endrew F. v. Douglas Co. Sch. Dist., 137 S. Ct. 988 (2017).

Courts have generally ruled that Comp Ed is not an appropriate remedy for violations of IDEA that are purely procedural in nature unless the procedural violation actually denied FAPE or educational benefit to the student. See, Maine Sch. Admin. Dist. No. 35 v. Mr. and Mrs. R., 321 F.3d 9 (1st Cir. 2003) [while compensatory education is not an appropriate remedy for a purely procedural violation of IDEA, in contrast, a substantive violation may give rise to it. Here, the prospective relief sought at the beginning of the proceedings was both procedural and substantive, so a claim for compensatory education arguably lies and the case is not moot]. See also, Erickson v. Albuquerque Pub. Schs., 199 F.3d 1116 (10th Cir. 1999); P.P. v. West Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009) and 20 U.S.C. §1415(f)(3)(E)(ii).

C. District Failure to Implement an IEP

Even an appropriate IEP can constitute a denial of FAPE if not implemented. Comp Ed is often awarded when there is a "material IEP implementation failure" and IEP services are not provided. Similarly, Comp Ed may be awarded in cases where it is found that the IEP was implemented, but it was not implemented appropriately either because personnel were not trained and/or capable of appropriate implementation or an inappropriate methodology was used by the district. Comp Ed can also be awarded where an inappropriate "change of placement" occurred via the use of disciplinary action. Letter to Zirkel, 74 IDELR 171 (OSEP 2019).

VII. "COMP ED" AS A REMEDY FOR "COVID IMPACT" OR "THE COVID SLIDE"

A. Are "Compensatory Education Services" the Right Remedy for COVID Impact?

As we have discussed, the concept of a court ordering a school district to provide Comp Ed to a student for whom it did not provide FAPE under IDEA makes sense when a school district has violated the law. However, is "compensatory education" the appropriate terminology to use when discussing the provision of services that students with disabilities will need to make up for skills or learning lost during school closures and other disruptions caused by COVID-19? I have steadfastly maintained that it is not.

When discussing Comp Ed in the context of COVID-19, I remain partial to using a term that is based upon an assessment of COVID's impact on the student's present levels and educational needs upon return to "normal school operations," such as COVID Impact Services and Supports (CISS). I say this because the use of the term "compensatory education" or "compensatory services" suggests that the school district was at fault for educational loss experienced by its students when much of what has and is happening is not within the control of school districts. In addition, suggesting that school districts are at fault does not support or encourage the collaborative process in which parents and districts will need to engage when determining the appropriate path for providing educational services that are needed to promote student learning recovery.

Obviously, this is not to say that an award of "compensatory education" against a school district in the time of COVID would never be appropriate. It is certain that there have been and will be situations where a school district has not made good faith, reasonable efforts to provide FAPE during a COVID school closure period "to the greatest extent possible" and/or the school district does not make good faith, reasonable efforts to appropriately address educational impact when "normal operations" resume. However, to suggest that all school districts should be subject to an award of "compensatory education" due to COVID is absurd and divisive. Indeed, one well-known attorney who represents families in special education matters wrote in April that "'Comp Ed' are fighting words. By talking that language, we are creating a confrontational posture with school districts and we are misleading our clients. Compensatory education is not the right analytic framework for this situation."[7]

Notwithstanding my view on whether "Comp Ed" or "compensatory services" are the right terms to use for addressing COVID's impact on the educational needs of students with disabilities, many states, districts and organizations continue to use the term. For that reason and because it may simply not matter, I can live with the term "compensatory services," as long as everyone using the term understands what it means and agrees to an appropriate framework to use when addressing it, such as what I have suggested in Section VIII of these materials.

B. Summary of Decisional Law Status in COVID FAPE and Comp Ed Cases

1. General summary points

At the time of the preparation of these presentation materials, this is a fair general summary of decisional law that has been issued in COVID FAPE and Comp Ed Cases:

- So far, there has been no real definitive or binding court case law reported nationally regarding FAPE obligations during COVID. This is primarily because IDEA student-specific FAPE cases must travel through due process proceedings first pursuant to the legal doctrine of "exhaustion of administrative remedies."

- Guidance is slowly emerging regarding school obligations during the 2020-21 school year in the form of hearing officer decisions and SEA Complaint resolutions. More precedential guidance with respect to individual student situations will come from the courts as aggrieved parties in due process proceedings seek court review. While we will more than likely have a good bit of "COVID case law" in the future, it will be some time before a solid, reliable body of COVID special education case law has developed. Will it be too little, too late?

- Most of the reported due process and State complaint decisions to date address an alleged failure to implement an IEP/denial of FAPE during the Spring/Summer of 2020. However, hearing decisions nationwide began to emerge in the late Fall of 2020 addressing

[7] COPAA Blog Post & Comments (April 24, 2020), Let's Not Talk "Comp Ed" Generally for COVID-19 by Andrew Feinstein, Esq. This document can be found at: https://www.copaa.org/blogpost/895540/COPAA-Blog.

challenges to services provided during the 2020-21 school year and have continued. For the most part, the FAPE standard in Spring/Summer 2020 appeared as IEP/DLP implementation "to the extent possible." As time is progressing, however, more has been expected as "possible" in light of the circumstances.

- Where a "material IEP implementation failure" or denial of FAPE is found, compensatory education services are being awarded in the form of either: 1) direct service delivery by the school; or 2) reimbursement for private in-person services obtained by the parents. Most direct compensatory services awards typically are in the form of an order for the district to provide a certain amount of services or for the student's IEP team to meet and determine what, if any, compensatory services are appropriate.

- Districts or schools that maintained a flat "no in-person services to anyone" position during the 2020-21 school year and refused to consider individualized possibilities for in-person services appear to be the most vulnerable in FAPE and IEP implementation failure cases seeking compensatory education services as a remedy.

2. Some sample due process hearing decisions

While there have not been any court decisions awarding a compensatory education remedy for a denial of FAPE due to COVID, there are some COVID-related hearing officer decisions that have emerged. Below is a sampling of some of them that have been reported:

A. Florence Co. Sch Dist. 1, 121 LRP 10625 (SEA SC 2021). Compensatory services are awarded to a 9-year-old student with OHI and SLD where the district failed to implement the student's IEP during school closures. The student's IEP included a BIP and the provision of a paraprofessional in the general education setting with specialized instruction in a resource room. However, when schools closed due to COVID, the district transitioned to virtual education, but did not provide the student with resource services or a para. As the 2019-20 school year ended, progress the student had been making in the school program began to "flat line" as the year ended, even with efforts on the part of the ESY special education teacher. While it could have been the shutdown, the reliance on virtual education, the lack of 1:1 teaching in the school setting, being at home, or a combination of all of these things that caused the slowdown in progress, it was the district's responsibility to respond to any change in circumstances that negatively impacted upon the student's education and "more of an effort could have been made" to provide services to the student during the shutdown and over the summer of 2020.

B. Special Sch. Dist. of St. Louis Co and Parkway C-2 Sch. Dist., 121 LRP 15324 (SEA MO 2021). Where student would have received appropriate services had the parent completed the private school's enrollment forms as instructed, the district did not deny FAPE where it made efforts to find an alternate private school placement when his special education school terminated his enrollment in March 2020. At the time that the former school was terminating services, the district administrator tasked with arranging private services for students with disabilities secured a spot in the new private special education school even though it was not accepting new students. The new school and the parent communicated

by email as early as March 30, 2020—the same time the former school was ending services. The new school would have been able to implement the student's IEP during the period of distance learning, but the parent refused to complete the 31-page intake form required for enrollment. Because the district attempted to provide FAPE, the parent cannot hold it responsible for the lack of services in the Spring of 2020. In addition, the district did not violate IDEA by creating a distance learning plan for the student without holding an IEP meeting where the DLP did not replace the student's IEP. Rather, the DLP detailed how the IEP would be implemented during the extended school closures.

C. Orcutt Union Sch. Dist., 121 LRP 15399 (SEA CA 2021). District denied FAPE when creating a distance learning plan for a 14-year-old student with autism that was not tailored to meet the student's unique needs. In addition, the plan expected the student's mother to provide 1:1 behavioral supports for nearly the entire distance learning period. Where state law requires that "specialized instruction" be provided by a credentialed special education teacher, the district materially failed to implement the student's IEP. In addition, the DLP was not individualized for the student, but was identical to the plans of other similar students in the school district. This approach, along with the expectation that the parent would provide the needed 1:1 behavioral support during distance learning denied FAPE. Accordingly, the district must provide 428 hours of compensatory education to be used in any educationally related area of the mother's choice.

D. Nashoba Regional Sch. Dist., 121 LRP 8486 (SEA MA 2021). Although the pandemic was an extraordinary circumstance requiring some "unavoidable" deviations from the student's IEP, the district's delay in providing Orton-Gillingham services to an 8-year-old student with SLD and ADHD amounted to a denial of FAPE. While the pandemic made implementation of services much more difficult, the duty to provide them under IDEA remained unchanged. At the start of school closures, it was "clear" that the district expected the parents to provide, at least partially, direct services in reading, written language and math by implementing the student's remote learning plan. A few weeks after the school closures when the teacher began providing remote O-G services, the student had become "too dysregulated to participate effectively." To correct this, the district must convene the student's IEP team to discuss compensatory education services if it has not already done so.

E. Clark Co. Sch. Dist., 78 IDELR 86 (SEA NV 2020). Where the district opted to provide all students with distance learning through live and recorded instructional sessions and did not consider whether the student with an intellectual disability needed in-person services, FAPE was denied. The IEP only offered the student daily resource room instruction consisting of separate 15-minute sessions for math, reading and writing, and an additional 10-minute session for math and language arts. In addition, the September 2020 IEP specified services that were based upon across-the-board limits for distance learning rather than the individualized needs of the student. In fact, the IEP reduced the amount of time the student spent in the special education setting from 49% to 32% of the day. Further, the district failed to provide OT services to the student during the initial months of the 2020-21 school year. Thus, the district is to convene an IEP meeting, reimburse the parent for private tutoring services and fund private OT services for the student.

F. District of Columbia Pub. Schs., 120 LRP 25019 (SEA DC 2020). Though the due process complaint alleges that the district denied FAPE by not providing all speech language and OT services during the school closure period, FAPE was not denied. An IEP implementation failure denies FAPE if it is material—that is, if it substantially deviates from the services required by the IEP. According to the district's tracking information, the student resisted attending speech therapy, but the district offered the required 120 minutes of speech services per month up to the time schools closed. While the district offered no speech therapy during the month of April, the district did offer 155 hours of teletherapy the following month. According to US DOE, schools were not required to provide special education services during the pandemic if they were not providing any services to the general student population. The parent did not show that the general student population received services during April. Even if they had been, the loss of one month of services, under these circumstances was not material, especially where the district made up for some missed services in May. With respect to OT, the district provided enough make-up teleservices in May so that the student actually received approximately the same amount as required by the IEP. Addressing the student's history of resisting related services, where the student is more receptive to teletherapy than in-person therapy based upon embarrassment, the student must be provided related services through videoconferencing, even after schools reopen and until the end of the 2020-21 school year.

G. Los Angeles Unif. Sch. Dist., 77 IDELR 116 (SEA CA 2020). District is ordered to provide the student 40 hours of compensatory postsecondary transition counseling to assist with locating employment for a student who aged out of IDEA eligibility on July 31, 2020. The parent's requested relief to allow student to continue in school with her existing placement and services after the end of 2020 extended school year through the fall/winter semester is not an appropriate remedy because there is no way to know when hands-on services will resume in the future. Clearly, though, a compensatory remedy is appropriate where the 12th-grader with autism received less than half of the specialized services required by her IEP during COVID-related school closures between March and May 2020—which constitutes a material implementation failure (a shortfall of 116 hours of hands-on vocational instruction). When the parent asked for the continued placement, the school district did not respond until the parent filed for due process on May 18th. The fact that the district may have implemented the student's IEP "to the best of its ability" was not enough to comply with IDEA where US DOE has noted that a district may need to provide compensatory education to a student if she was unable to receive FAPE during school closures. This is one of those circumstances, but to order continued virtual programming would not make sense or meet the student's needs. Thus, the 40 hours of compensatory postsecondary transition counseling is ordered.

VIII. A GENERAL FRAMEWORK FOR DETERMINING "COMPENSATORY SERVICES" TO ADDRESS COVID IMPACT AND LEARNING LOSS

Absent any clear definitions of "compensatory services" or description of "applicable standards and requirements" from the courts or U.S. DOE that apply to COVID circumstances, schools and families are left to determine what this all means in terms of how to address the issue. Some states have already mandated or provided nonbinding guidance on whether and how this is to be done, while others are leaving it to the discretion of school districts via their IEP Team processes. My effort here to provide a general suggested framework for addressing the issue is not based on official law, court decisions or informal guidance from the U.S. DOE. It is based upon what I believe is one way that makes sense in determining the need for "compensatory services" using a framework that will benefit students with disabilities and, hopefully, avoid unnecessary litigation.

A. Compensatory or "Learning Loss" Determinations for all Public School Students

First and foremost, no matter what we call this thing that the U.S. DOE called "compensatory services" in March 2020, it seems that reasonable minds can agree that when schools "resume normal operations" (i.e., operations close to what they were at the beginning of March 2020 – whenever that may be), decisions will be made for all public school students about:

- The impact, if any, that COVID school closures and circumstances have had on a student's present levels of performance, skills and current needs and how educational services may need to be adjusted accordingly to match current levels of performance and needs; and

- What "additional," "recovery" or "compensatory services," if any, are appropriate to help a student more quickly "close the gap" caused by COVID's interference with learning or what some have called "the COVID slide."

Assuming that all school districts across the country intend to continue to address "learning losses" for all of their students caused by COVID circumstances, then it would be discriminatory not to consider the same for students with disabilities, obviously. No matter what is called, then, it needs to be done, since Congress has provided significant funding to address this issue for all students.

B. Additional Considerations for Students with Disabilities

For students with disabilities specifically, it has been my suggestion that "compensatory services" to address learning losses caused by COVID circumstances be approached using the following eight-step framework:

- Review State/Local Guidance
- Collect and Analyze Data
- Prioritize IEP Reviews
- Convene IEP Meetings
- Determine "Current Need" Services
- Determine "Additional" or "Recovery Services" Needed
- Document any "Additional" or "Recovery Services"

➢ Deliver “Additional” or “Recovery Services”

1. Review State/Local Guidance

As I said earlier, some states and local school districts have already developed guidance with respect to making decisions about a student’s need for “compensatory services.” Obviously, state and/or local school district guidance, including that of local or state agency counsel, must be considered, reviewed and followed, as appropriate and/or required.

2. Collect and Analyze Data

Decisions about a student’s need for “compensatory services” to address COVID Impact and learning loss must obviously be based upon appropriate and sufficient data. Thus, relevant data must be collected and analyzed before and during the time that schools “resume normal operations.” Examples of data to be collected and analyzed would include, from a variety of sources, the following:

- Performance/progress data before school closures occurred, including previous ESY regression/recoupment data;
- Performance/progress and service data during distance learning/school closure period during the 2019-20 school year;
- Performance/progress and service data collected over the summer of 2020;
- Performance/progress and service data collected during the 2020-21 school year and the Summer of 2021;
- Performance/progress and service data collected/obtained by the parents during all of the above-referenced time periods (via parent surveys, interviews, other avenues);
- Performance/progress and service data collected during a “reasonable period of time” after school reopens and normal instruction resumes, including recoupment data.

3. Prioritize IEP Reviews

Some IEP reviews should take priority and can and should occur more quickly. Examples may include situations, among others, where:

- Student has obvious and easily defined “new current needs” to be addressed;
- Student was not appropriately engaged in learning during any school closure period of 2019-20 or during the 2020-21 school year;
- Student has obviously suffered severe regression in critical skills due to the break in instruction that cannot be recouped within a reasonable period of time;
- Student’s IEP was not timely reviewed or is due for annual review;
- Student’s parent demands an immediate IEP meeting to make a “compensatory services” determination; or
- Student has aged out of eligibility for services or will soon do so.

4. Convene IEP Meetings

In convening IEP meetings to make "compensatory services" determinations, it appears to me that there are at least two options for doing so:

- Convene a typical IEP Team review meeting (in-person or virtually, as appropriate and in accordance with all procedural requirements); or
- Unless the meeting is the annual review meeting, make changes to the IEP without an IEP meeting with agreement of the parent (and in accordance with all procedural requirements) to update current present levels, needs, goals, services, etc.

5. Determine "Current Need" Services

At the IEP meeting and in the process of determining present levels and "current need" services, consider making the following determinations:

- Based upon collected and analyzed data, what IEP adjustments, if any, to present levels, goals, services are needed?
- Are there "new" needs (behavioral, physical or mental, social/emotional, academic, etc.) for which the district needs to provide services for FAPE? If so, what are they?
- Did the student regress significantly in critical skill areas and/or fail to make appropriate progress in the general curriculum or toward IEP goals such that "additional services" are needed to help the student to more quickly "close the gap" created by COVID circumstances? **If YES**—move to step 6.

6. Determine "Additional" or "Recovery Services" Needed

If services are determined necessary to help the student more quickly "recover" from learning or critical skill losses or gaps created by COVID, the following questions should be considered and discussed:

- What extra/"additional" or "recovery services" are considered appropriate to lessen the impact of the COVID-19 school closures and disruptions on the student's skills and/or progress?
- Will the failure to provide "recovery" or "additional services" prevent the student from making appropriate progress in light of the student's circumstances?
- Will the student be overwhelmed with "additional services?" In other words, will there be diminishing returns if the school requires/provides services that are "over and above" services to meet "current needs?"
- Is the student/parent willing to participate in "additional services?"

7. Document any "Additional" or "Recovery Services"

If it is determined that "additional" or "recovery services" are appropriate, those will need to be documented. My preference has been that "over and above" services be set forth in a separate "recovery services" document of some sort, while others have suggested they be placed in the IEP.

8. **Deliver "Additional" or "Recovery Services"**

If it is decided and documented that "additional" or "recovery services" are needed to ensure FAPE over and above addressing identified "current needs," the delivery of those services must be monitored and documented. Any "no shows" or unwillingness on the part of the student or parents to engage in "additional services" should also be documented. If this becomes a regular occurrence, a meeting should be held to discuss discontinuation of "additional" or "recovery services" due to lack of participation or engagement.