Let’s Not Talk “Comp Ed” Generally for COVID-19 Closure

By Andrew Feinstein, Esq.

Let's not rely on compensatory education to remedy the damage done to our kids during the period of COVID-19 school closure. “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.

School districts and courts generally regard compensatory education as a remedy for a denial of a free appropriate public education, either in the design of the educational program or in its implementation. The term is freighted with notions of fault and wrongdoing. Although the statutory basis for compensatory education does not support this connotation, it clearly exists.

Most attempts to argue or demonstrate that a school district was at fault for failing to provide certain services during the period of COVID-19 closure will almost certainly fail. It is hard to imagine a hearing officer or a judge blaming a school district for not providing in-person services or for providing fewer hours of other services. And, to the extent that negligence is the test, school districts will argue contributory negligence of the parents. We certainly do not want the educational skills of parents to be subjected to school district scrutiny. Only in extreme cases, such as where the district refuses to provide any education to students with a disability while providing distance learning to all other students, would a strong claim for compensatory education likely be successful.

This is really a matter of terminology. When school reconvenes, the child's IEP Team will need to meet and determine present levels of performance as a prerequisite to designing a program and placement. Parents, who have been carefully tracking performance during the period of distance learning, should have a significant voice in setting the current level of performance. If the student's performance is below where it was on the day schools closed for the COVID-19 pandemic, the IEP Team will be obliged to provide more intense services than those provided in the prior IEP.

Not every student will need remedial services. Some students will progress appropriately in the at-home program. Others will experience significant regression. In each case, the IEP team must, after the closure ends, closely examine the student’s progress or regression, craft accurate present levels of performance, and provide services based on the needs established by the data.
Indeed, under *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), the standard for compensatory education is not an hour for hour calculation. Rather, "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." 401 F.3d at 524. It is a qualitative standard based on individual assessments of the student.

The approach we should be advocating in this case is exactly the one outlined in *Reid*. The district needs to accurately assess the student and then design a program to provide the educational benefit that likely would have accrued from the services the district would have provided but for the closure.

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*We work to increase the quality and quantity of advocate and attorney representation. We believe the key to accessing individualized, effective educational programs is assuring that students with disabilities and their parents are equal members of the educational team.*

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