



FAQ on Compensatory Education in the time of COVID-19

1. What is compensatory education?

Compensatory education is designed to put a student in the place they would have been had the student not been deprived of special education and related services. The content of a program of compensatory education needs to be based on a student's individual level of performance. The IDEA requires school districts to provide a free appropriate public education (FAPE) to students with a disability by providing each eligible student with an Individual Educational Program (IEP) designed to meet that student's unique needs. 20 U.S.C. § 1412(a)(1). Compensatory education is an equitable remedy to remediate the loss of a FAPE for a period of time. It aims to provide "services prospectively to compensate for a past deficient program." *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008). Such awards "should place children in the position they would have been in but for the violation of the Act." *Id.* at 1289, citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

An award of compensatory education does not require a finding of negligence or fault on the part of a school district. Instead, compensatory education merely remedies a loss of special education services without regard to the cause of that loss. So, the loss of special education services due to a COVID-19 forced school closure entitles students to compensatory education, as the U.S. Department of Education has made clear. See <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf> and <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

Every federal Circuit Court of Appeals has recognized that compensatory education is an appropriate remedy to redress a school district's denial of FAPE: First Circuit, *Pihl v. Mass. Department of Education*, 9 F.3d 184, 188 (1st Cir. 1993); Second Circuit: *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated & remanded sub nom Sobol v. Burr*, 492 U.S. 902 (1989), *re aff'd on reconsideration*, *Burr v. Sobol*, 888 F.2d 258 (1989); Third Circuit, *Lester H. v. Gilhool*, 916 F.2d 865, 868-69 (3rd Cir. 1990); Fourth Circuit, *G. v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003); Fifth Circuit, *Spring Branch Independent School District v. O.W.*, 938 F.3d 695, 712 (5th Cir. 2019); Sixth Circuit, *Hall v. Knott County Board of Education*, 941 F.2d 402, 406 (6th Cir. 1991):

Seventh, *Board of Education. of Oak Park & River Forest High School District 200 v. Ill. State Board of Education*, 79 F.3d 654, 656 (7th Cir. 1996); Eighth, *Meiner v. Missouri*, 800 F.2d 749, 753-54 (8th Cir. 1986); Ninth Circuit, *Parents of Student W. v. Puyallup School District*, No. 3, 31 F.3d 1489, 1496 (9th Cir. 1994).; Tenth Circuit, *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1123 (10th Cir. 1999); Eleventh Circuit, *Jefferson County Board of Education v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988); and D.C. Circuit, *Reid*, 401 F.3d at 518. The courts have explained that compensatory education is necessary to remedy the harms caused by the deprivation of FAPE.

For example, the Eighth Circuit held that compensatory education fell squarely within the framework provided by *Burlington*. The appeals court stated that, “as in *Burlington*, recovery is necessary to secure the child’s right to a free appropriate public education.” *Id.* It then observed, “[w]e 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.” *Id.*

The Second Circuit explained: without compensatory education, the right to FAPE is illusory; the student “cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.” Citing *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988). It noted, that “[i]t is well settled that “where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done,” citing *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted).”

The D.C. Circuit Court stated: “Given the availability of reimbursement for compensatory education were it impossible to obtain an award of compensation itself, children’s access to appropriate education could depend on their parents’ capacity to front its costs – a result manifestly incompatible with IDEA’s purpose of ‘ensuring that all children with disabilities have available to them a free appropriate public education.’” *Reid.* at 522-23, quoting 20 U.S.C. § 1400(d)(1)(A)(emphasis in original).

The Fifth Circuit held that compensatory education is available as a remedy and that “compensatory awards...are designed to provide ‘services prospectively to compensate for a past deficient program.’” *Spring Branch Ind. Sch. Dist. v. O.W.*, 938 F.3d 695, 712 (5th Cir. 2019), citing *Draper v. Atlanta Indep. Sch. Sys.* 518 F.3d 1275, 1280 (11th Cir. 2008). Compensatory education is only available for periods when the school district has failed to provide a FAPE. *Id.* Thus, the purpose of the award is to “place children in the position they would have been in but for the violation of the Act.” *Id.*, citing *Draper*, 518 F.3d at 1289.

2. How is the amount of compensatory education awarded?

There are two different measures courts have used, a quantitative approach and a qualitative approach.

With a “quantitative approach,” the court provides an hour for hour replacement of services lost. The Third Circuit articulated the standard: “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.” *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996).

More recently, courts have relied on the “qualitative approach,” first articulated by the D.C. Circuit in *Reid*. Instead of looking at services lost, the qualitative approach looks to the educational benefit lost. Referring to the quantitative approach, the *Reid* court said, “this cookie-cutter approach [quantitative] runs counter to both the ‘broad discretion’ afforded by IDEA’s remedial provision and the substantive FAPE standards that provision is meant to enforce.” *Id.* at 523. Awards should be based on individualized assessments, leading to different results depending on the differing needs of students. It concluded: “the inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Id.* at 524. The court reasoned that there must be evidence regarding the child’s specific education deficits and the specific compensatory measures required to correct them. *Id.* at 526. These awards, by contrast to ordinary education programs which need only provide ‘some benefit’ compensatory education awards “must do more – they must compensate.” *Id.* at 518. The award should be “reasonably calculated to provide the educational benefits that like would have accrued from special education services the school district should have supplied in the first place.” *Id.* at 524.

Students have received awards of compensatory education based on their individual circumstances. *See, e.g., Somberg v. Utica Cmty. Schs.*, 908 F.3d 162, 167 (6th Cir. 2018) (school district ordered to pay for 1,200 hours of tutoring and one year of transition planning); *Ferren C. v. Sch. Dist. of Phil.*, 612 F.3d 712, 179-20 (3rd Cir. 2010) (funding a trust fund and providing an IEP beyond age 21); *Draper*, 518 F.3d at 1283, 1285 (provision of a private school placement to last until the student received a high school diploma or until a date specific (extending the time for eligible services) whichever came first).

Regardless of whether courts take a quantitative approach or a qualitative approach, they agree that, when students are deprived of FAPE because school districts have

violated or were unable to comply with the substantive requirements of IDEA, including Child Find, students are entitled to an award of compensatory education.

3. How do we manage claims that the remedial education planned for all students will suffice for students in special education?

School districts are certain to argue that all students suffered from a loss of educational services, that students with disabilities who are eligible for special education are general education students first and foremost, and that the remedial education planned for all students will compensate special education students for their lost educational opportunities as well. This argument is valid as far as it goes. Yet, a student with an IEP has certain goals and objectives to meet in the time period of the IEP. Additional, individualized services are provided to the student in the IEP (i.e., reading intervention). So, while general remedial services will be helpful in many cases, they do not take the place of compensatory education in making up for lost education during COVID-19 closures and distance learning.

4. What if the school district argues that all students suffered from a reduction in resources and services generally because of school closings?

Federal law requires school districts to provide FAPE to eligible students. Eligible students who were deprived of FAPE during the school closings are entitled to compensatory education.

5. Will all children with IEPs be entitled to compensatory education because they lost out on in-person teaching expected in their IEPs?

No. Some children may have made adequate progress during the period of school closure because they were able to benefit from distance learning. Some students who were high school seniors may want to move on to college or work without getting any additional educational services from their school districts.

6. How will school districts determine which children get compensatory education?

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 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.

Students who failed to make progress or benefit from remote education may be eligible as well. 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.

Under *Reid*, 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.

7. What if the schools argue that they have a reduced funding environment that makes it hard to provide FAPE?

School districts may be financially strained in reopening after the COVID-19 closure. The right of a student with a disability to a free appropriate public education (FAPE) is an entitlement under federal law. School districts are free to opt for more economical alternatives provided, however, that the educational program provided meets the standard of a FAPE, as elucidated by the Supreme Court in *Endrew F. v. Douglas Country School District*, 137 S. Ct. 988 (2017). That standard has three parts. First, a student's IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the **child's** circumstances." *Id.* at 999. Second, all students are entitled to "the chance to meet challenging objectives." *Id.* at 1000. Third, for students not fully integrated in regular education, the IEP "must be appropriately ambitious in light of [the child's] circumstances." *Id.* Shortage of funds is not a valid excuse to fail to provide a FAPE.

8. What are the options for special dispute resolution on Covid-19 compensatory education from the states or at a statewide level?

A number of groups have discussed methods of awarding compensatory education to students in a state or students in a district to avoid the transactional costs of evaluating individual claims of the 7 million students with IEPs in the country. Clearly, the most

cost-effective way to provide compensatory education is for school districts to work with parents of students with disabilities to design educational programs to place these children where they would have been but for the closure. Special education programming is inherently and fundamentally individualized. That means that a general program of remedial education is unlikely to meet the compensatory education needs of each student with an IEP. COPAA is committed to getting students with disabilities the compensatory education they need and are entitled to. We are also committed to doing so in the most expeditious, cost-effective and amicable way possible.

If parents disagree with the compensatory education recommended by the school district, they can use the dispute resolution mechanisms available: mediation, a state complaint, or a due process hearing.