



COMPENSATORY EDUCATION AND THE COVID-19 PANDEMIC

Counter Perspectives on Available Relief

By Joanne Butler, Denise Rekem and Judith Weinstock

Since March 2020, students in New Jersey and across the country have been impacted by school closures due to the COVID-19 pandemic. From March 18, 2020, through the remainder of the 2019–2020 academic year, it became clear that what at first seemed temporary, was in fact going to require a significant pivot in the provision of education. During the 2020–2021 academic year, students throughout New Jersey experienced a mix of remote, hybrid and in-person learning as a result of the pandemic. Throughout this significant length of time, students with special education needs were not able to access and/or benefit from many of the services and supports outlined in their Individualized Education Plans (IEP) under the Individuals with Disabilities Education

Act (IDEA). On March 12, 2020, at the start of the pandemic, the United States Department of Education (USDOE) issued guidance requiring “to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA, or a plan developed under Section 504.”¹ Shortly thereafter, on April 27, 2020, former United States Secretary of Education Betsy DeVos notified Congress that she was not requesting a waiver of “any core tenants of the IDEA”² and Congress has not waived students’ entitlement to a free appropriate public education (FAPE), including implementation of their IEPs.

Both the USDOE and the New Jersey Department of Education (NJDOE) have since issued various guidance that discuss

the need for school districts to assess the need of each student to determine if they require compensatory education as a result of their not receiving FAPE.

What is Compensatory Education?

The IDEA requires that school districts provide students with disabilities with FAPE to meet their individual needs. To accomplish this goal, a student is provided with an IEP which is specifically designed to meet that individual student's needs and allow them to make meaningful educational progress. Compensatory education is not included among the protections of the IDEA, but is an equitable remedy long recognized by courts to provide additional services and support to students who have been denied FAPE or whose IEPs have not been fully implemented as written. The Third Circuit Court of Appeals held that compensatory education "aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of IDEA, by providing the educational services children should have received in the first instance."³

It is important to note, especially

when discussing compensatory in the context of COVID-19, an award of compensatory education does require fault on the part of the school district and its purpose is not to be a levy of damages. Rather, compensatory education focuses on the student's needs and seeks to remedy the loss of special education services regardless of the cause of the loss.

COVID-19 Compensatory Education: NJDOE Guidance

On March 3, 2021, the NJDOE issued Guidance for Determining Compensatory Education for Students With Disabilities.⁴ The NJDOE advised that students with disabilities who did not receive the services included in their IEPs may be entitled to compensatory education if it is determined that the failure to provide those services caused a denial of the student's right to FAPE. The NJDOE discussed some of the ways in which school districts and parents could analyze whether the provision of special education and related services during COVID-19 denied the individual student's entitlement to FAPE, including review of formative and summative, as

well as formal and informal assessment, data to determine progress toward each student's IEP goals and objectives during the period of remote and hybrid instruction. The analysis was to have taken place at the next IEP meeting, whether virtual or in person, or at a meeting once in-person instruction resumes, to determine the services that were not provided during remote or hybrid instruction and the impact of those missed services on the student's progress toward their IEP goals and objectives. If the student's progress was impacted by missed services, compensatory education is required. The IEP team would then determine the nature, frequency and duration of services.

COVID-19 Compensatory Education: USDOE Guidance

In its Sept. 30, 2021, Return to School Roadmap Guidance, the USDOE provided its most specific recommendations to address compensatory education entitlements due to the impact of COVID-19.⁵ The USDOE stressed that all compensatory education decisions must be made on the individual student's present level of academic and functional performance



JOANNE L. BUTLER, partner at Schenck Price Smith & King, LLP, focuses her practice on the representation of local public school districts as general or special counsel in areas including governance, ethics, special education, HIB, residency, restorative practices, discipline, sexual harassment, affirmative action, tenure, seniority, benefits, unbecoming conduct, and Constitutional issues.



DENISE DIMSON REKEM, partner at Parles Rekem, LLP, focuses her practice on the representation of individuals with special needs and their families in the areas of early intervention, special education, transition and adult services, residential placements, guardianships, bullying and discipline.



JUDITH WEINSTOCK, counsel to Parles Rekem, LLP, focuses her practice on the representation of individuals with special needs and their families in the areas of early intervention, special education, transition and adult services, residential placements, guardianships, bullying and discipline.

such that the IEP team can determine whether, and to what extent, compensatory services may be needed to mitigate the impact of services received during the pandemic on the student's receipt of appropriate services required under the IEP. USDOE also provided guidance for using extended school year (ESY) services (which need not be limited to the summer months) as compensatory education services, although the compensatory services cannot be used in place of ESY services to which a student may be entitled under their IEP.

New Jersey Legislative Action Extending Educational Access

The IDEA requires that students who are eligible for special education and related services be offered such programs through the end of the school year in which they turn 21. New Jersey's Legislature acted to combat COVID-19's school and business restrictions by extending services to eligible students beyond age 21. Commonly referred to as S-3434, the legislation provides that students turning 21 during the 2020–2021, 2021–2022 or 2022–2023 school years could receive additional or compensatory special education and related services, including transition services, during the next school year.⁶

While the Bridge Year Pilot Program is not limited to classified students, its protections enable parents and local school districts to agree that individual students in the graduating classes of 2021 and 2022 could access an additional year to address learning loss and missed opportunities for extracurricular activities due to COVID-19.⁷

New Jersey Legislative Action Extending Statute of Limitations for COVID Claims

On March 3, 2022, Gov. Phil Murphy

signed S905/A1281, which extends the statute of limitations for filing a due process petition regarding the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE, during the COVID-19 school closure or periods of virtual, remote, hybrid, or in-person instruction between March 18, 2020, and Sept. 1, 2021. The latest date you can now file due process for these claims is Sept. 1, 2023.

The new law directs school districts to hold IEP team meetings no later than Dec. 31, 2022, to discuss the need for compensatory education and services for all students who had an IEP at any time between March 18, 2020, and Sept. 1, 2021. Districts must provide notice to parents or guardians that a purpose of the meeting is to discuss the need for compensatory education and services for the period from March 18, 2020, to Sept. 1, 2021. Following the meeting, written notice must be provided indicating all compensatory education determinations made by the IEP team and all compensatory education services agreed to must be documented in the IEP, including frequency, duration, location, and agreed upon time period for delivery. A parent or guardian may thereafter file for a due process hearing if they disagree with the compensatory education determination at any time, up to and including Sept. 1, 2023. The law specifically does not apply to students covered by S-3434 discussed above.

COVID-19 Compensatory Education: Board Attorney Perspective (Joanne Butler)

COVID-19 changed education forever. Educators and providers learned and implemented largely unfamiliar ways to instruct, relying on technology more than textbooks, sharing screens instead of blackboards. This Herculean effort,

however, sometimes is overlooked by those who focus on what was not done, or what was not done to the complete satisfaction of those voicing their opinions. There can be no presumption that all students, across the board, in all school districts, were harmed by the metamorphosis of elementary and secondary education occasioned by COVID-19. Similarly, there can be no presumption that all students who experienced difficulties due to hybrid or remote instruction were denied FAPE and, therefore, are entitled to compensatory education.

The compensatory education analysis requires an identification and quantification of what services were missed, followed by a comparison of the student's anticipated progress and actual progress. The former is relatively simple. The latter, however, comparing expectations and reality, is the more complex analysis. Data is critical here, whether formal or informal assessments. Input from the student's teachers and providers as to the student's day-to-day functional performance also is an integral part of the analysis. Teams also must consider information provided by the parents. There is no disagreement that there will be gaps between where some students were expected to function at the end of their annual IEPs and where the students actually functioned. The presumption, however, that all lack of progress is solely attributable to a deficiency in the educational services received is too simple.

Just as pre-COVID IEP teams would consider factors completely independent of a student's educational program that may have negatively impacted the student's performance, COVID-era IEP teams must do the same. Our children were hurled into a whole new world in March 2020, a world which not only kept them home from school but kept their parents or child care providers home

from work. Families were huddled together, sometimes jockeying for Wi-Fi, but were otherwise isolated. In too many instances, families also were battling, and losing, the war that is COVID. Compensatory education obligations arise only where there was a failure by the local public school to provide the services required by the IEP and that failure impeded the student's progress.

There is a wealth of case law that discusses how and when to provide compensatory education. In 2015, the Third Circuit in *G.L. v. Ligonier Valley School District Authority* acknowledged that compensatory education aims to place disabled children "in the same position they would have occupied but for the school district's violation of the IDEA."⁸ However, there appears to be a misconception that the Third Circuit mandates a one-to-one compliance. This is erroneous. In *Lester H. by Octavia P. v. Gilhool*, the Third Circuit upheld a District Court award of 30 months of compensatory education services, representing more than a year that the student remained in his day placement and more than a year and a half that he received five hours of home instruction per week instead of being placed in the residential placement required by his IEP. The Third Circuit affirmed the District Court's determination, noting that the District Court "left ample room for the exact contours of the remedy to be shaped."⁹ Neither pre-COVID Court ordered that the school district provide all the services missed as compensatory education, which included residential services, each day, for 30 months.

In the COVID era, the NJDOE specifically declared that "Neither the IDEA nor the State's special education regulations require a 1:1 ratio when calculating the amount of compensatory education to be awarded to a student with a disabili-

ty."¹⁰ One-to-one correspondence is not required, but the IEP team must make individualized decisions based on missed services due to the public school's action, the impact of those missed services, and how to ameliorate the loss. Using all of the information critical to the compensatory education analysis, New Jersey IEP teams, including parents, have determined whether, how much, and how to implement compensatory services. Targeting the areas where anticipated progress was not met, additional services have been provided, and will continue to be provided for some time, based upon individual needs. Many local school districts started providing compensatory education services well before the NJDOE March 2021 guidance, providing ESY and extended day services as early as Summer 2020, targeting those individual students whose learning losses were most significant and tailoring the programming to address those deficits. During the 2020–2021 and the current 2021–2022 school years, schools have continued to work toward addressing the needs of those specific students whose ability to derive meaningful benefit during COVID has been hampered.

COVID-19 Compensatory Education: Parent Attorney Perspective (Denise Rekem, Judith Weinstock)

The IDEA ensures that "all children with disabilities are entitled to a free appropriate public education (FAPE) to meet their unique needs and prepare them for further education, employment and independent living." FAPE is provided through the development of the IEP, which contains the individual services a student requires to make meaningful educational progress. IDEA's statutory definition of FAPE includes providing special education and related services in conformity with the student's IEP.¹¹ As a

result of the COVID-19 pandemic, the receipt of FAPE was compromised for most students when student IEPs were not fully implemented. When the pandemic started in March 2020 during the last months of the 2019-2020 academic year, most schools were providing asynchronous learning via worksheets or online videos, and many students lacked the technology to even access that instruction.

A student is entitled to compensatory education if the student's IEP did not provide FAPE or the IEP was not implemented as written. According to Third Circuit precedent compensatory education should be provided on a 1:1 basis.¹² For example, if 30 speech and language sessions were not provided, the student is entitled to have those sessions provided as compensatory education. In the example of *Lester H.*, the court clearly used a 1:1 approach, awarding 30 months of compensatory education for 30 months of not receiving a FAPE. Unlike most COVID cases where parents are looking for compensatory services now, though, in *Lester H.*, the services were to be added to the end of the student's eligibility or after the student turned 21. Since the student was only 12 at the time of the decision, the court said the parents and school personnel could decide closer in time as to what specific services the student needed during the 30 months of additional education. In *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260 (3d Cir. 2014), the student was awarded compensatory education in the amount of "one hour for each hour of each school day for each year he attended [Central Dauphin and]...fifteen hours for each of the six weeks for missed summer programs for the years from 2000 to 2004." This hour-for-hour approach totaled 10,000 hours of compensatory education using a 1:1 ratio. In *G.L. v. Ligonier Valley School Dis-*

strict Authority, the court stated that the aim of compensatory education is to place the student “in the same position they would have occupied but for the school district’s violation of the IDEA ‘by providing the educational services children should have received in the first instance.’” During the COVID-19 pandemic many, if not all, students did not receive their IEP services for the frequency set forth in their IEPs thus entitling them to compensatory education.

Another common occurrence during the pandemic was services provided virtually as opposed to the in-person instruction required in the IEP. New Jersey State Board of Education enacted temporary regulations effective April 1, 2020, allowing IEPs to be implemented virtually, through online platforms or telephonically but only “as appropriate.”¹³ While some students benefited from the virtual model, for others virtual instruction was not appropriate and did not allow the student to make the same rate of progress they were expected to make with in-person instruction. Here again, compensatory education is indicated. In addition, students referred for evaluation and not evaluated within IDEA timelines may be entitled to compensatory education for the period of time of the delay if they were subsequently found eligible for special education and related services.

Given that Congress did not choose to waive IDEA requirements during the pandemic, students that did not receive FAPE due to COVID-19 disruptions are entitled to all rights and remedies as students that were denied FAPE prior to the pandemic. The use of a regression/recoupment standard, such as is used to determine ESY services and suggested by the NJDOE in its March 3, 2021, guidance, is not the appropriate standard for determining compensatory education. A

regression standard would deny students a year and a half of learning as a student who retained knowledge from prior to March 2020 but learned no new skills since then would be left with no remedy. Compensatory education is required when a student’s IEP has not been fully implemented or the virtual instruction was not appropriate for them.

Congress chose not to waive any of IDEA’s core requirements during COVID and it requires that students with disabilities who were affected be made whole. This is the law. Compensatory education is not meant to punish the school district or to suggest that teachers, administrators, parents and school boards did not work tirelessly to limit the impact of the pandemic on students. Compensatory education should not be viewed as a failure by the school. It is simply the entitlement of the student under the IDEA to have their IEPs fully implemented and to receive instruction that is appropriate.

Conclusion

As our schools move forward serving our special needs students with enhanced creativity and technology, the issue of compensatory education will continue to dominate discussions between and among board and parent attorneys. This debate will not disappear until well after the pandemic has ended, and we can expect to see new case law on COVID-era compensatory education in the years to come. ■

Endnotes

1. 34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504). sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf
2. www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf.
3. *G.L. v. Ligonier Valley Sch. Dist. Auth.*,

- 802 F.3d 601, 608 (3d Cir. 2015). nj.gov/education/broadcasts/2021/mar/GuidanceforDeterminingCompensatoryEducationforStudentswithDisabilities.pdf
4. nj.gov/education/broadcasts/2021/mar/GuidanceforDeterminingCompensatoryEducationforStudentwithDisabilities.pdf.
5. *Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals With Disabilities Education Act*; OSEP QA 21-06.
6. P.L.2021, c.109, enacted 6/16/21, legiscan.com/NJ/text/S3434/2020.
7. P.L.2020, c.41, enacted June 26, 2020 njleg.state.nj.us/2020/Bills/PL20/41_.PDF.
8. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d at 608.
9. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).
10. nj.gov/education/broadcasts/2021/mar/GuidanceforDeterminingCompensatoryEducationforStudentwithDisabilities.pdf
11. 20 U.S.C. § 1401(9).
12. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990)
13. nj.gov/education/sboe/meetings/agenda/2020/April/public/5d%20Item%20D%20Special%20Education%20revised.pdf.