

Post Pandemic “Compensatory Services”

Perry A. Zirkel¹

In March 2020, the U.S. Department of Education (USDE) issued guidance declaring that upon resumption of normal school operations, “a child’s IEP team (or appropriate personnel under Section 504) must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost” (USDE, 2020, p. A-1). As the pandemic finally subsides and the new school year quickly approaches, this seeming obligation for “compensatory services” looms large, with confusion and questions predominating.

Confusion

The confusion centers on the failure to sufficiently differentiate this proactive response to learning loss referred to as “compensatory services” from the adjudicative remedy for denial of FAPE referred to often as “compensatory education” but sometimes synonymously as compensatory services. Examples of this confusion abound.

Illustrating the perspective of legal advocacy, a large law firm representing parents of students with disabilities recently posted this message to their present and potential clients:

[B]oth the United States and Pennsylvania Department of Education have explicitly recognized that many, if not most, children with disabilities are entitled to some level of compensatory education to address the almost-inevitable diminishment of educational opportunities and meaningful programming during the pandemic. Skilled advocacy is more essential than ever in ensuring that appropriate compensatory education is provided to address any inadequate programming both pre-pandemic and during the pandemic (McAndrews & Connolly, 2021).

¹Perry A. Zirkel is university professor of education law at Lehigh University. He shares his work in special education law, including his publications, a monthly legal update, and special supplements, via his website perryzirkel.com.

The understandable confusion extends to neutrals responsible for the IDEA’s decisional dispute resolution processes. For example, a hearing officer recently cited the federal guidance for compensatory services as the initial framework for the ultimate remedy of 80 hours of compensatory education (*Corona Norco Unified School District, 2021*). Similarly, upon determining that the district failed to implement a child’s IEP for a specified period during the pandemic, a state complaint investigator relied on the federal guidance for the ordered remedial corrective action of a delegated determination of compensatory education (*Mounds View Public School District, 2021*).

As final examples, some of the state guidance documents reflect the continuing confusion. Vermont’s (2020) evolving guidance seems to suggest that the IEP team use denial of FAPE as the standard for its determination of compensatory services, thus conflating the USDE’s proactive procedure with the IDEA’s adjudicative remedy. Although using the distinguishable label of “recovery services,” Ohio’s guidance (2020) similarly suggests that IEP teams use denial-of-FAPE indicators for its determination. Arizona’s guidance (2020) goes a step further toward regarding compensatory services as the remedy of compensatory education by allocating the determination of denial of FAPE to the school district without the necessity of an IEP team meeting.

Questions

The following FAQ illustrates key questions and tentative answers for this evolving situation. Interested individuals should consult with specialized local legal counsel in assessing these proposed answers in determining their specific choice of actions.

1. What is the relationship between the guidance provision for compensatory services (CS) and the traditional remedy of compensatory education (CE)?

The relationship amounts to a partial analogy. Although overlapping for the commonality of being compensatory and individualized, the differences that are explained in a more detailed analysis (Zirkel, 2021) include the following:

	CS	CE
Context	specific to COVID-19	not exclusive to COVID-19
Nature	system-wide proactive procedure	third-party remedial order
Basis	learning loss	denial of FAPE
Majority Approach	regression-recoupment	qualitative or hybrid

2. What are recommendations for CS that may alleviate the current confusion?

First, use a much more clearly distinguishable term for CS, such as “COVID-19 recovery services.” Second, be careful not to over-do the analogy to CE, which can result in not only saddling IEP teams with the role of hearing officers but also over-saturating the student with services beyond the school day.

3. What are related overall considerations?

First, recognize that the latest CARES legislation provides short-term funding for addressing “learning loss” for students generally, including but not limited to those in special education. Second, realize that whatever the district does for CS does not immunize its potential liability for CE but may serve as a deduction from any CE award, depending on the specific facts of the case and the ultimate determination of the complaint investigator or adjudicator.

4. Will further federal guidance be forthcoming?

In a recent FAQ, USDE’s Office for Civil Rights (2021) announced: “The Department is aware of important questions regarding compensatory services for students with disabilities and plans to address those in a separate guidance document” (p. *7).

5. What specific steps are suggested for districts to consider?

Local school authorities, with their legal counsel, should consider (a) whether the federal guidance and any applicable state guidance may serve as the jurisdictional basis for the IDEA’s investigative or

adjudicative procedures, and, if so, whether they are likely to be persuasive?; (b) if the district decides to follow the federal guidance, whether the majority approach for the determination, which primarily relies on regression- recoupment, is most suitable for IEP teams?; and (c) is the better alternative is to have IEP teams meet promptly upon resumption of full-in person services to examine progress data, including any recoupment updates, and revise the IEP to address the child’s individual needs without any separate and supplemental CS? Exemplifying this final alternative, a recent state complaint investigation decision concluded that the federal guidance “may have raised expectations and caused some to believe that ‘compensatory services’ were mandated after COVID-19 school closures, [but] that is not the case.” Instead, distinguishing the remedy of compensatory education, this decision interpreted the federal guidance as “best . . . understood as consistent with the school’s duty to monitor student progress and revise the IEP, as appropriate” (*Student with a Disability*, 2021, p. *15).

Conclusion

The bottom-line is that special education leaders need to rely on their professional skills to avoid the confusing semantics of this unprecedented situation and to focus instead on the substantive solution. Although federal and state guidance continues to evolve, the solution ultimately is a local determination. It is a critical time for addressing the overriding question on a district by district basis—how to best use limited resources to maximize the outcomes of students with disabilities.

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