

FAQ on Compensatory Education in Response to COVID-19

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The IOLTA Fund of the Bar of New Jersey helped provide the funding for this FAQ.

Acknowledgments

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1. What is compensatory education?

Answer: Compensatory education, also known as compensatory services, is a judicially created remedy which entitles a student to receive additional special education and related services, accommodations and modifications when their rights under the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act of 1973 (Section 504) have been violated. Although IDEA's statute and regulation do not specifically refer to compensatory education, IDEA gives a court broad discretion to "grant such relief as [it] deems appropriate" when a student with a disability's rights under IDEA have been violated. 20 U.S.C. Sec. 1415(i)(2)(c)(iii); 34 C.F.R. 300.516(c)(3). In Barnes v. Gorman, 536 U.S. 181, 189 (2002), the United States Supreme Court held that remedies available under Section 504 also require a recipient to compensate a person with the disability "for the loss caused by the failure" to comply with the law.

Like public school districts and charter schools, in New Jersey, approved private schools accepting placements of students with disabilities from public school districts must comply with special education requirements and, thus, have been found responsible for compensatory education awards. See, e.g., P.N. ex rel J.N. v. Greco, 282 F. Supp. 2d 221, 237 (D.N.J. 2003); Garden Academy v. S.M. & E.M. o/b/o B.M., 2021 U.S. Dist. LEXIS 17689, No. 19-20655 (D.N.J. January 29, 2021).

The United States Department of Education (US ED) has repeatedly recognized the "equitable remedy" of compensatory education, including in its September 30, 2021 [guidance](#), "Return to School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment Under the Individuals with Disabilities Education Act" (Return to School Roadmap). There, using the term compensatory services, US ED defines it as "services to address the child's needs after a failure or inability to provide FAPE [a free appropriate public education] over a given period of time," noting that this includes the failure to provide services "identified on the child's IEP [individualized education program]." US ED, Return to School Roadmap, pp. 25-26. The United States Department of Education's Office for Civil Rights (OCR) has also recognized the remedy of compensatory education for students receiving services under Section 504, including in its February 2022 [guidance](#) "Fact Sheet: Providing Students with Disabilities Free Appropriate Public Education During the COVID-19 Pandemic and Addressing the Need for Compensatory services Under Section 504."

According to binding precedent in this circuit, the aim of compensatory education is “to place disabled children in the same position they would have occupied but for the school district’s violation of IDEA,’ by providing the educational services children should have received in the first instance.” G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608 (3d Cir. 2015); Ferren C. v. Sch. Dist. Of Philadelphia, 612 F.3d 712, 717-718 (3d Cir. 2010).

Common instances where a student may be entitled to compensatory education include:

- When a school district¹ knew or should have known a student’s IEP did not provide a FAPE, allowing a reasonable time for the school district to correct the deficiency. See, e.g., M.C. o/b/o J.C. v. Central Reg’l. Sch. Dist., 81 F.3d 389, 396-397 (3d Cir. 1996)
- When a school district stops providing any IEP services to a student. See, e.g., P.N. v. Greco, 282 F.Supp.2d 221, 236 (D.N.J. 2003) (student entitled to 17 days of compensatory education when his school stopped providing any services for that period of time); US ED, [Return to School Roadmap](#), pp.27-28 (“if some or all of the child’s IEP could not be implemented using the methods of service delivery available during the pandemic”) See also US ED webinar on “Lessons from the Field-Providing Required Compensatory Services That Help Students with Disabilities in Response to the COVID-19 Pandemic.” US ED [July 27, 2022 Transcript](#), p. 4.
- When a student’s IEP is not fully implemented. Tyler W. v. Upper Perkiomen Sch. Dist., 963 F. Supp. 2d 427 (E.D. PA 2013)(holding, although student received one hour of academic instruction per day, that hour was not in compliance with specially designed instruction set out in IEP and no related services were provided, entitling student to 28 hours per week of compensatory education times 15 school weeks for total of 420 hours of compensatory education); US ED, [Return to School Roadmap](#), pp. 27-28; US ED [July 27, 2022 Transcript](#), p. 4.
- When district does not fulfill its “child find” obligation and/or complete evaluations in accordance with IDEA or within required timelines. Ridgewood Bd. of Educ. v. N.E. ex rel M.E., 172 F.3d 238 (3d Cir. 1999)(once found eligible, student may be entitled to compensatory education for time

¹ The term school district is used throughout to include charter schools and any other local educational agency (LEA) providing public educational services.

prior to evaluation, classification and IEP development); US ED, [Return to School Roadmap](#), p. 27 (“if the initial evaluation, eligibility determination, and identification, development and implementation of the IEP for an eligible child were delayed”); US ED [July 27, 2022 Transcript](#), p.4.

- When a school district doesn’t comply with IDEA’s stay-put. [M.R. v. Ridley Sch. Dist.](#), 868 F.3d 218, 229-230 (3d Cir. 2017) (IDEA’s stay-put “gives rise to two concomitant rights” -- to stay-put in the current educational placement and to compensatory education or reimbursement when the school has not complied with the stay-put”); [Doe v. East Lyme Bd. Of Educ.](#), 790 F.3d 440, 456 (2d Cir. 2015) (“[W]hen an educational agency has violated the stay-put provision, compensatory education may — and generally should—be awarded to make up for any appreciable difference between the full value of stay-put services owed” and what was actually provided).

Courts have held that students may be entitled to compensatory education even after they move to another school district within New Jersey or move to another state. See [D.F. v. Collingswood Borough Bd. Of Educ.](#), 694 F.3d 488 (3d Cir. 2012); [L.T. v. Mansfield Twp. Sch. Dist.](#), 2009 WL 1971329, No. 04-1381 (D.N.J. July 1, 2009). Students may also be entitled to compensatory education after they have received a high school diploma. [C.M. v. Bd. Of Educ. of Union Cty, Reg’l High Sch.](#), 128 Fed. App’x 876 (3d Cir. 2005) (holding that IDEA claims for compensatory education are not mooted by student’s graduation from high school) (UNPUB).

2. When New Jersey schools closed on March 18, 2020, how were school districts allowed to provide educational services to students with disabilities?

Answer: IEPs in place when the COVID-19 pandemic began were intended to be implemented through in-person instruction.² Both US ED and New Jersey

² Through [Executive Order 104](#), Governor Murphy ordered New Jersey schools to close by March 18, 2020, and many schools closed for in-person instruction effective March 16, 2020. Under [Executive Order 149](#), dated May 29, 2020, district-operated summer educational programming was allowed, but not required, to open after July 6, 2020. The state-ordered closing of schools for in-person instruction was fully rescinded by [Executive Order 175](#) on August 13, 2020. Since that time, school closings have been made on a district-by-district basis in coordination with local health officials.

Department of Education (NJDOE) said when school facilities were closed due to the COVID-19 pandemic, however, that school districts could provide the services contained in a student’s IEP, virtually, online or telephonically, but only “*as appropriate.*” See March 21, 2020 US ED Office for Civil Rights [guidance](#), “Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities”; April 3, 2020 NJDOE [guidance](#), “Providing Special Education and Related Services to Students with Disabilities During Extended School Closures as a Result of Covid-19.” Similarly, N.J. State Board of Education’s emergency amendments to special education regulations allowed special education services to be provided through electronic communications, virtual, or other online platforms, “*as appropriate.*” See, e.g., N.J.A.C. 6A:1-1.1(d)5; N.J.A.C. 6A:14-3.9(a); N.J.A.C. 6A:14-5.2(f).

3. Were districts told they would need to consider providing compensatory services when schools reopened?

Answer: Yes. Despite allowing districts to provide virtual instruction “*as appropriate*” for the individual student, US ED recognized that it might not be possible to provide all IEP services during school closures or that virtual instruction would not be appropriate for some students. In its March 12, 2020 [guidance](#), US ED told school districts that once schools reopened, parents and their child’s IEP team would need to meet and “make an individualized determination whether and to what extent compensatory services may be needed...” See also US ED Office of Civil Rights, March 21, 2020 [guidance](#), p. 2 (same); US ED, [Return to School Roadmap](#), p. 24 (noting critical importance of IEP teams making individualized decisions to “determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child’s receipt of appropriate services”). In this same guidance, US ED further said that “A determination of compensatory services by the child’s IEP Team is an appropriate proactive mitigating measure intended to address the needs of the child due to the LEA’s failure or *inability* to provide appropriate services.” Id. at 28 (emphasis added); US ED, [July 27, 2022 Transcript](#), p. 4.

Similarly, NJDOE made it clear to districts that even if they provided virtual services during school closures, compensatory services might be warranted when the student returned to school. In its March 23, 2020 [guidance](#), “Updates and Frequently Asked Questions Related to COVID-19 School Closures,” NJDOE told

districts that if students with disabilities did not have access to internet connectivity needed to participate in online instruction, the IEP team would need to determine what compensatory instruction the student required when school districts reopened. In that same guidance, NJDOE said that IEP teams might need to consider compensatory services on a case-by-case basis for other students receiving virtual services. In its April 30, 2020 [guidance](#), “Parental Waivers for the Delivery of Remote or Virtual Special Education and Related Services,” NJDOE told districts that the student’s IEP team, including the parent(s)/guardian(s), should decide if the student should receive compensatory education services. Concerned that students who were graduating or had turned 21 might not have received all of the services in their IEPs, in its June 12, 2020 [guidance](#), “Providing Additional Services for Students with Disabilities Who Will Graduate or Exceed Eligibility for Special Education Services,” NJDOE strongly encouraged districts to meet with students and discuss the need for compensatory services beyond June 30, 2020. In a [Broadcast Memo](#) issued on March 3, 2021, “Guidance Regarding Compensatory Education Determinations for Students with Disabilities as a Result of COVID-19,” NJDOE again told schools that IEP meetings should be held with parents to determine the need for compensatory education.

4. Are students who age out of eligibility when they turn 21 years of age entitled to seek compensatory education?

Answer: For many years, students who turned 21 years of age have been entitled to file claims for compensatory education for prior FAPE violations because compensatory education is only providing the student what they should have received before they aged out. Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Ferren C. v. Sch. Dist. Of Phila., 612 F.3d 712 (3d Cir. 2010). After the pandemic hit, US ED stated in [Return to School Roadmap](#), p. 30 that compensatory services for students turning 21 “could take the form of an additional period of eligibility”; US ED [July 27, 2022 Transcript](#), p.4. In its June 12, 2020 [guidance](#), NJDOE strongly encouraged districts to meet with students and discuss the need for compensatory services beyond June 30, 2020 for students who were graduating or had turned 21.

On June 16, 2021, New Jersey enacted [N.J.S.A. 18A:46-6.3](#) which extends the age of eligibility and allows students who turn 21 during the 2020-2021, 2021-2022 and 2022-2023 school years to receive additional and compensatory special education,

related services, and transition services if the student’s IEP team, including the parent, met and decided they needed these services. The eligibility age extension was limited to one school year unless the student’s IEP team, hearing officer or court decided that a longer period was needed. Students who qualify for the extended eligibility under N.J.S.A. 18A:46-6.3 have all the procedural and substantive rights they had before turning 21, including the right to file due process and to seek the protection of IDEA’s stay-put to maintain their placement during any due process hearing. It also means that districts are obligated to continue to develop IEPs, conduct evaluations and otherwise comply with state and federal requirements. Decisions where the stay-put was enforced under N.J.S.A. 18A:46-6.3 include B.D. v. Edison Twp. Bd. Of Educ., OAL Dkt. No. eds05026-21 (June 21, 2021); F.R. & N.R. o/b/o C.R. v. Freehold Reg. Bd. Of Educ., eds05447-21 (July 8, 2021); J.S. o/b/o D.D. v. Wayne Twp. Bd. Of Educ., eds05781-21 (July 16, 2021).

5. What are my school district’s obligations to address the need for compensatory education related to the COVID-19 pandemic?

Answer: As discussed above, US ED and NJDOE both issued guidance early on in the COVID-pandemic telling school districts that once students returned to school, IEP teams might need to consider compensatory services. See e.g. US ED March 12, 2020 [guidance](#); US ED’s Office for Civil Rights March 21, 2020 [guidance](#); NJDOE March 23, 2020 [guidance](#); NJDOE April 13, 2020 [guidance](#), “Guiding the Education Community Through the COVID-19 Pandemic”; NJDOE April 30, 2020 [guidance](#); and NJDOE June 12, 2020 [guidance](#).

On March 3, 2022, New Jersey enacted [N.J.S.A. 18A: 46-1.3](#) which, among other things, requires no later than December 31, 2022, or earlier if requested by a parent or guardian, school districts to hold an IEP team meeting to discuss the need for compensatory education and services for every student with a disability who had an IEP at any time between March 18, 2020 and September 1, 2021. The requirement to hold an IEP meeting no later than December 31, 2022 includes students with disabilities who are no longer enrolled because, among other reasons, they may have received their high school diplomas or turned 21 by June 2020 and were not covered by the statute extending the eligibility age discussed above.

A parent does not need to wait for the district to schedule an IEP meeting to discuss their child's need for compensatory education but may write a letter to the district asking that the IEP meeting be held. It is best to send the letter by fax or certified mail to confirm receipt. If the district fails to hold the required IEP meeting to discuss compensatory education, the parent can still file due process seeking compensatory education.

At the IEP meeting, the IEP team, including the parent, determines "whether, how, and when the child will access individualized compensatory services, including the time, location, and format of the services..." In making decisions about compensatory education, US ED stressed that LEAs should be transparent about the relevant legal standards and factors they believe IEP Teams must consider in determining a student's individual need for, and the extent of, compensatory services. US ED, [Return to School Roadmap](#), p. 26-27.

Following the IEP meeting, a school district must provide the parent with written notice indicating all decisions made by the IEP team as to compensatory education and services, including their frequency, duration, location, and agreed upon time period for delivery. This information should be documented in the IEP.

Parents who disagree with any pandemic-related compensatory education decisions concerning services provided between March 18, 2020 to September 1, 2021 have a right to file a due process petition as long as they do so by no later than September 1, 2023.

If a school district already held an IEP meeting before March 3, 2022, discussed the need for compensatory education and other services at the meeting, and gave the parent written notice of the IEP team's determination, the school district is not required to hold another IEP meeting, unless agreed to by the parent and the district. The parent still has until September 1, 2023 to file a petition challenging the decisions of the IEP team.

Note: N.J.S.A. 18A:46-1.3 does not apply to students who turned 21 during the 2020-2021, 2021-2022 or 2022-2023 school years. These students are covered by N.J.S.A. 18A:46-6.3 discussed in Question 4, above.

6. Does a failure to implement any aspect of an IEP entitle a student to compensatory education?

Answer: Not necessarily. In deciding whether an award of compensatory education is warranted for not fully implementing a student's IEP, most Courts of Appeals have held that there must be more than a *de minimis* failure to implement the IEP. Some courts have referred to a "material" failure which they define as more than a *minor discrepancy* between the services provided to the child and the services required by the child's IEP. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007). The Van Duyn court emphasized that no demonstrable harm was required although a student's actual progress, or lack of progress, might be probative of whether the discrepancy was "material." It went on to say, "for instance, if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material." Id. In L.J. by N.N.J. v. Sch. Bd. Of Broward Co., 927 F.3d 1203, 1214 (11th Cir. 2019), the court cautioned that reviewing courts should not rely too heavily on actual educational progress but rather needed to compare the services that are actually delivered to the services described in the IEP itself and *how important* the withheld services were in view of the IEP as a whole.

The Third Circuit Court of Appeals, which covers New Jersey, has not established precedent on whether even a minor failure to implement an IEP warrants compensatory services. The court, however, has considered the issue in two unpublished decisions. See Melissa S. v. Sch. Dist. of Pittsburgh, 183 F. App'x 184 (3d Cir. June 8, 2006) (not published); Fisher v. Stafford Twp. Bd. of Educ., 289 F. App'x 520, 524 (3d Cir. August. 14, 2008) (not published). In Fisher, supra, the student's LOVAAS-trained aide for two days a week unexpectedly quit. The school district offered to have one of its in-school aides work with the student while it hired and trained a new aide. Under those circumstances, the Court held that the district's inability to provide the student with a LOVAAS-trained aide for ten days while it recruited and trained a new aide was a *de minimis* occurrence. In Melissa S., supra, the Court affirmed the district court's finding that there was no evidence that the IEP was not fully implemented.

7. Is it true that school districts were not allowed to conduct *any* evaluations virtually while schools were closed during the COVID-19 pandemic?

Answer: No. In its March 16, 2020 [guidance](#), “Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students,” US ED Office of Civil Rights told school districts that if an evaluation of a student with a disability required a face-to-face assessment or observation, the evaluation would need to be delayed until school reopens. Evaluations and re-evaluations that did not require face-to-face assessments or observations, however, could take place while schools were closed, so long as a student’s parent or legal guardian consented. In its September 28, 2020 [guidance](#), “Questions and Answers for K-12 Public Schools in the Current Covid-19 Environment,” pp. 4-5, US ED’s Office of Civil Rights said that where in-person evaluations were not possible, schools should conduct assessments virtually or via other comparable methods, to the extent that they could be administered by trained personnel in conformance with the test producer’s instructions, and in a manner otherwise consistent with 34 C.F.R. § 104.35(b). It stressed that nothing in Section 504 prohibited parents and school personnel from mutually agreeing to postpone the timelines and utilizing a diagnostic placement for a child suspected of having a disability until an appropriate comprehensive evaluation could be conducted safely. See also NJDOE June 2020 [guidance](#), “The Road Back Restart and Recovery Plan for Education,” p.74 (districts should develop procedures to complete undone or incomplete evaluations to determine eligibility).

8. Are students whose evaluations for eligibility were delayed during the COVID-19 pandemic entitled to compensatory education?

Answer: Yes, if it is eventually determined that the student was eligible for special education and related services. A finding of eligibility means that the IEP team has found that the student has a qualifying disability which adversely impacts the student’s performance and requires special education and/or related services. Thus, if the student did not receive needed special education and/or related services on a timely basis, then the only way to put the student in the same position as they would have been with those services is to provide them as compensatory education. See, e.g., *Ridgewood Bd. of Educ. v. N.E. ex rel M.E.*, 172 F.3d 238 (3d

Cir. 1999); US ED, [Return to School Roadmap](#), p. 27 (recognizing evaluation delays as a basis for consideration of compensatory services).

In [Independent School District No. 283 v. E.M.D.H.](#), 960 F.3d 1073 (8th Cir. 2020), the Court of Appeals rejected the school district's argument that it could not evaluate student because she wasn't attending classes in-person. The court found that "the record reflects that the District made no effort to assess the Student in her virtual classroom..."); US ED, [Return to School Roadmap](#), p. 27 (student might be entitled to compensatory education "if the initial evaluation, eligibility determination, and identification, development and implementation of the IEP for an eligible child were delayed"); US ED [July 27, 2022 Transcript](#), pp.4 and 6 ("if a school couldn't or didn't provide a student the education and services...that would've been found appropriate after a timely evaluation [under either IDEA or Section 504], the school has an obligation to make an individualized determination about that student's need for compensatory education and services.")

9. What if some or all of the services, accommodations and modifications that were provided virtually were not appropriate for the student?

Answer: The student should be entitled to compensatory education for those virtual services that were not appropriate for the student. US ED, [Return to School Roadmap](#), at p. 27; US ED [July 27, 2022 Transcript](#), p. 4.

In an effort to ensure that virtual services were appropriate for the individual student, NJDOE guidance, [March 23, 2020](#) and [April 13, 2020](#), and US ED guidance, [March 12, 16](#), and [21](#), 2020, told districts to consult with parents on how to best ensure that students had the necessary support and equitable access to the virtual programs. In its March 21, 2020 [guidance](#), US ED's Office of Civil Rights specifically reminded districts that students with disabilities were entitled to "equally effective access" to virtual instruction. See also Answer to Question 3.

10. What factors could be helpful in determining whether the virtual instruction that was provided was appropriate for the student?

Answer: Virtual programs had to be consistent with requirements that applied to in-person instruction. General requirements to consider include: 1) a "school day"

was to consist of not less than four hours, except two and one-half hours was sufficient for a full day in kindergarten;³ 2) the virtual programs must be consistent with state regulations pertaining to home programs;⁴ and 3) districts were required to offer “active instruction” with opportunities for both synchronous (in live time) and asynchronous (not live, pre-recorded) instruction.⁵

Other factors to consider include: (1) were the virtual services individualized to the student’s needs; (2) concerns raised by the parents, the child or other individuals who supported, observed or provided private services during the time the child was receiving virtual instruction; (3) data showing the child’s present levels of performance and comparing it to anticipated levels of performance prior to the COVID-19 pandemic; (4) whether the updated data shows a loss of skills the student previously had; (5) the child’s rate of progress prior to the COVID-19 pandemic and whether it slowed or halted during virtual or hybrid instruction; and (6) new or different areas of need or behaviors exhibited by the child. US ED, [Return to School Roadmap](#), pp. 26-27; US ED [July 27, 2022 Transcript](#), pp. 4 & 6.

11. How is the amount of compensatory education determined in this Circuit?

Answer: Courts of Appeal have used two approaches to determine how much compensatory education to award — a quantitative approach and a qualitative approach. The Third Circuit uses a quantitative approach or what is sometimes referred to as the 1:1 ratio approach. It uses the quantitative approach both when a student’s IEP does not offer a FAPE and when there are issues concerning the implementation of the student’s IEP such as occurred during the COVID-19 pandemic.

In G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608 (3d Cir. 2015), the Court emphasized that the aim of compensatory education is “to place disabled children in the same position they would have occupied...*by providing the educational services children should have received in the first instance.*” (Emphasis supplied.)

³ N.J.A.C. 6A:32-8.3(b).

⁴ N.J.A.C. 6A:16-10.1.

⁵ [Executive Order 175](#) (Aug. 13, 2020).

In one of the earliest cases in this Circuit using the quantitative approach, Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), the Court upheld an award of 30 months of compensatory education services for the 30 months that the student did not have an appropriate program. See also M.C. o/b/o J.C. v. Central Reg'l. Sch. Dist., 81 F.3d 389, 396-397 (3d Cir. 1996) (remanding for compensatory education for the period of time the IEP did not provide FAPE, allowing a reasonable time for the district to rectify the problem by developing an appropriate IEP); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238 (3d Cir. 1999) (remanding for district court to consider eight years of compensatory education for the time period the district failed to evaluate and provide IEP services to the student); Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 715 (3d Cir. 2010) (affirming award of three years of compensatory 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.

In addition to Third Circuit cases like those above, there are numerous district court decisions where the quantitative or 1:1 approach was used when the school district did not implement the student’s IEP at all or did not fully implement it. See, e.g., P.N. v. Greco, 282 F. Supp. 2d 221, 236 (D.N.J. 2003) (where the district court distinguished between revising a deficient IEP -- as in M.C. o/b/o J.C. v. Central Regional Reg'l Sch. Dist., 81 F.3d 389 (3d Cir. 1996) where a school district is allowed a reasonable time to correct the deficiency -- and a complete cessation of schooling for the student). The district court held that where there has been a complete cessation of educational services, it is not reasonable for the student to be without instruction for any length of time and it awarded the student 17 days of education for the 17 days without any schooling); A.S. v. Harrison Twp. Bd. of Educ., Civ. No. 14-147, 67 IDELR 207 (D.N.J. Aug. 18, 2016) (for 12 school days student was without any instruction, the student was entitled to receive six hours per day times 12 days or 72 hours of compensatory education); L.T. v. Mansfield Twp. Sch. Dist., 2009 WL 1971329, No. 04-1381 (D.N.J. July 1, 2009) (for 17 days without any school, student entitled to 7 hours per school day times 17 days for a total of 119 hours); Buckley v. State Correctional Institution-Pine Grove, 98 F. Supp. 3d 704, 719 (M.D. PA. 2015)

(student awarded full days of compensatory education for each school day during which student received only paper work packets and occasional opportunity to ask teacher questions); Sch. Dist. of Phila. v. Post, 262 F. Supp. 3d 178 (E.D. PA. 2017) (awarded 360 minutes weekly from mid-October 2014 through end of school year for time removed from general education environment called for in student's IEP); Kayla W. v. Chichester Sch. Dist., No. 20-6082, 2022 U.S. Dist. LEXIS 29356, 122 LRP 6261 (E.D. PA Feb. 18, 2022) (entitled to full days of compensatory education).

Even where the school district implemented some aspects of a student's IEP, the court found that if non-implementation of other IEP elements "pervaded and undermined" the student's entire day, the student was entitled to one day of compensatory education for each day the full IEP was not implemented. See, e.g., Tyler W. v. Upper Perkiomen Sch. Dist., 963 F. Supp. 2d 427, 439 (E.D. PA 2013) (awarded full days of compensatory education or a total of 420 hours even though some instruction was provided).

In Keystone Central Sch. Dist. v. E.E., 438 F. Supp. 2d 519, 526 (M.D. PA 2006), the district court rejected the school district's claim that it should not use a quantitative approach because it assumed that the student received no benefit under the inappropriate IEP. In so holding, the court reasoned: "To require otherwise would place an arduous and near impossible task upon the administrative bodies to parse out the exact amount of hours E.E. was not benefited by FAPE. The IDEA does not require such a particularized fashioning of a compensatory education award."

In some cases, courts have held that the student needs more than an hour of compensatory education for each hour not provided. In Strawn v. Missouri Bd. of Educ., 210 F.3d 954 (8th Cir. 2000), the Court held the student could be entitled to more than just one year of compensatory education because "the optimum time for language acquisition is at a younger age than [the student's] present age"). In Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005), the Court held that the compensatory education award must also address "counterproductive" techniques that the student learned that he must now unlearn if he is to advance. See, e.g., Kelsey v. District of Columbia, 85 F. Supp. 3d 327 (D.D.C. 2015) (based on an expert's testimony, the student was awarded 1.5 hours of speech therapy for every missed hour of services due to the student's "likely frustration," "resistance to learning," and the need to build confidence when speech language services

resumed); B.D. v. District of Columbia, 817 F.3d 792, 798 (D.C. Cir. 2016) (must provide compensatory education for skills lost as well as new skills not learned).

In its [Broadcast Memo](#) issued on March 3, 2021, NJDOE stated that “[n]either 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 disability.” While literally true, this statement is deceptive. NJDOE is well aware that there are no references to compensatory education in state special education regulations and only one reference in federal regulations.⁶ Instead, courts have developed compensatory education as an equitable remedy and have determined how the amount is to be set. In accordance with Third Circuit Court of Appeals’ precedent, which is controlling in New Jersey, a quantitative approach is to be used when awarding this remedy.

Indeed, US ED has emphasized the need to follow applicable caselaw, instructing school districts to “be transparent about the relevant legal standards that IEP Teams must use to determine a child’s need for, and the extent of, compensatory services...” US ED, [Return to School Roadmap](#), p. 26. US ED further recommended that state educational agencies also “ensure that IEP Teams are appropriately aware of” any “applicable case law or a consent decree that impacts how compensatory services are identified and determined.” Id., p. 29.

12. Can the parent and school district agree to provide compensatory education services in other than a 1:1 ratio?

Answer: Yes. The parents and school district may agree to other than a 1:1 ratio of services not provided. For example, if the student was entitled to a 1:1 aide for one hour a day during math but received no aide for 30 days, the parties might agree that this could be remediated with 15 hours of 1:1 math tutoring. In other instances, the parents and school district may agree to extend the anticipated high school graduation date, add services to the IEP for a specified period of time, place a student in a private or out-of-district placement that could provide more intensive instruction or provide a smaller number of individual rather than small group therapies.

⁶The sole federal reference is at 34 C.F.R. 300.151(b) which pertains to the relief States should use as corrective action in State Complaints.

13. When can compensatory education be provided?

Answer: Compensatory services must be in addition to the IEP services a student is entitled to receive through their annual IEP. They can be provided by school staff or private providers before or after school, on the weekends or during the summer or when school is not in session.

Although compensatory education services can be provided during the school day, they must be offered at a time which does not impinge on either a student's receipt of the special education and related services set out in the student's current IEP or on the student's participation in the least restrictive environment (LRE). 20 U.S.C. Sec. 1412(a)(5); 34 C.F.R. 300.114(a); N.J.A.C. 6A:14-4.2(a)(1). A student's right to participate in the LRE includes not only attending general education classes, but also being able to participate in nonacademic and extracurricular services and activities, including meals, recess periods and other activities set out in 34 C.F.R. 300.107. 34 C.F.R. 117; N.J.A.C. 6A:14-4.2(b). In addition, students have a right to participate in physical education services. 34 CFR 300.108(a); N.J.A.C. 14-4.4.1(f). In New Jersey, students in grades kindergarten through 5 must have a daily recess period of at least 20 minutes a day. N.J.S.A. 18A:35-4.31. Students with disabilities must also have available to them the variety of educational programs and services available to nondisabled children including art, music, industrial arts, consumer and homemaking education and vocational education. 34 C.F.R. 300.110; N.J.A.C. 14-4.1(j). See also US ED, [Return to School Roadmap](#), p. 26 (recognizing compensatory services should be delivered in a manner that does not diminish participation in the LRE or in extracurricular and other nonacademic activities). If the compensatory services are provided outside of the regular school day, whether by school district or private personnel, the services must be at a mutually agreeable time.

In its July 27, 2022 webinar, US ED warned districts against using a one size fits all policy in providing compensatory education services. It gave as an example, limiting all compensatory services to after school hours, which may, in turn, prevent students who receive those services from fully participating in extracurricular activities. US ED [July 27, 2022 Transcript](#), p.7.

14. How can compensatory education services be provided?

Answer: Compensatory education can take many forms depending on what would be appropriate relief for a particular student. D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498-499 (3d Cir. 2012). It can include tutoring, summer school or other services developed by a district, as well as allowing a parent to select among several private providers. In some cases, courts and hearing officers have awarded compensatory education in the form of a trust fund for parents to use to obtain services for their child. See, e.g., Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 715 (3d Cir. 2010); D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260 (3d Cir. 2014). In other cases, courts have found that a private placement is an appropriate form of compensatory education. See, e.g., Draper v. Atlanta Indep. Sch. System, 518 F.3d 1275 (11th Cir. 2008) (upheld compensatory education award of four years of private school tuition).

15. What if a parent paid privately for IEP services not provided by the school district?

Answer: Compensatory education can also consist of monetary reimbursement for services provided by the parents. See, e.g., Doe v. E. Lyme Bd. Of Educ., 790 F.3d 440, 456-57 (2d Cir. 2015) (ordered parent to be reimbursed for related services district should have provided); Garden Academy v. S.M. & E.M. o/b/o B.M., 2021 U.S. Dist. LEXIS 17689, No. 19-20655 (D.N.J. January 29, 2021) (ordered to reimburse parents \$19,300 for services parents contracted for after Garden Academy stopped providing weekly home programming in student's IEP).

16. What if the student was without a computer or other device, lacked adequate access to the internet and/or was given only activity sheets or work packets?

Answer: Thousands of New Jersey students spent months without devices or internet needed to access virtual instruction and, in the interim, were given work packets with limited to no direct instruction or feedback by a certified teacher. Often, the packets consisted of generic work sheets, not specially designed to meet the student's unique needs. In other instances where the student had a computer and internet access, and despite changes to special education regulations allowing

for special education and related services to be provided through telemedicine, telehealth, virtual or online platforms, parents were still given only work packets or activity sheets to implement with their children.

In its March 21, 2020 [Supplemental Fact Sheet](#), US ED's Office for Civil Rights told districts that where technology itself imposed a barrier, school districts could meet their legal obligations only if they provided students with disabilities "equally effective alternate access" to the curriculum or services provided to other students.

NJDOE quickly recognized that work packets were not an "equally effective alternate access to the curriculum," as it told public school districts as well as charter schools and approved private schools for students with disabilities that if students did not have the technology or internet access needed to participate in remote learning, the student's IEP team, including the parent, would need to meet when schools reopened and determine what compensatory education services the student required. See NJDOE March 23, 2020 [guidance](#).

Work packets or activity sheets without direct instruction by teachers or related service providers also do not comply with New Jersey's home instruction regulations or with the revised special education and related services regulations. Home instruction regulations refer to providing instruction "directly, through online services...including any needed equipment" to access the online services. Packets are generally paper — not the online instruction contemplated by the home instruction regulations. N.J.A.C. 6A:16-10.1.

Home instruction regulations also require that Instruction must be provided by a properly certified teacher. N.J.A.C. 6A:16-10.1. Solely distributing work packets or activity packets (even if distributed via the internet) with an occasional email or telephone call is not instruction.

Similarly, the emergency amendments to special education regulations enacted effective April 1, 2020 did not authorize work packets or activity sheets as a valid way of providing special education and related services. See N.J.A.C. 6A:1-1.1(d)5; N.J.A.C. 6A:14-3.9(a); N.J.A.C. 6A:14-5.2(f).

Courts have found that work packets with little to no instruction violate IDEA. In Buckley v. State Correctional Inst.-Pine Grove, 98 F. Supp. 3d 704 (M.D. PA. 2015),

the district court awarded compensatory education to an adult student with a disability who received non-individualized study packets while in his cell in a correctional facility. On some days, the teacher remained outside the cell to answer questions but did not provide any instruction. The Court held that the student was entitled to full days of compensatory education for each school day he was given study packets.

In Handberry v. Thomson, 219 F. Supp. 2d 525, 544-45 (S.D.N.Y. 2002), the district court recognized that work packets were inadequate even for compulsory age inmates (without disabilities). The district court found the defendants' argument that generic, photocopied worksheets combined with five minutes of phone instruction per day was legally sufficient was "ludicrous."

Charles H. v. District of Columbia, Case 1:21-cv-00997 (D.D.C. June 16, 2021) involved 18 to 22-year-old incarcerated students with disabilities who received only work packets with no accompanying teacher-led instruction or direct related services during COVID-19 pandemic. The hearing officer determined that "work packets...with no scheduled interaction with any teacher, do not constitute specialized instruction or virtual instruction." The district court ordered defendants to provide the full hours of special education and related services in the IEPs through direct, teacher-or-counselor-led group classes and/or one-on-one sessions, delivered via live videoconference calls and/or in-person interactions, and to do so within 15 days of issuance of the order.

17. Does a student need to regress or lose skills they had when school facilities closed in order to be entitled to compensatory education?

Answer: No. There is no precedent in this or other circuits for using regression as a requirement for receiving compensatory services. The aim of compensatory education is to place the student in the same position they would have been in but for the district's violations of IDEA. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015) and Ferren C. Sch. Dist. of Philadelphia, 612 F.3d 712, 717-718 (3d Cir. 2010). For some students, the violations of IDEA may mean that they do not gain new skills while for others it may mean that they both lose skills (or regress) that they previously had and don't gain new skills. Linking a student's entitlement to compensatory services only to when the student regresses could never result in placing all students in the same position they would have occupied

but for the district's violations of IDEA, as both G.L. and Ferren require. At most, all it could do would be to return the students who regressed to where they were before the school district stopped providing the required IEP services. In a July 2022 webinar, US ED made clear that proof of regression or skill lost is not required to receive compensatory services. US ED [July 27, 2022 Transcript](#), p. 7.

A student does not need to suffer demonstrable educational harm when the district fails to fully implement their IEP. Van Duyn v. Backer Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007). See also Holman v. Dist. Of Columbia, 153 F. Supp. 3d 386 (D.D.C. 2016) (court reasoned that "Since proof of harm is not required...it follows that a material deviation from the prescribed IEP is *per se* harmful under IDEA." As to the fact that, despite not receiving all her IEP services, the student graduated from high school in three years, the court held this was irrelevant to determining if she was entitled to compensatory education for failure to implement her IEP. "A contrary holding would eviscerate the need for an IEP..."); Turner v. District of Columbia, 952 F. Supp. 2d 31 (D.D.C. 2013) (rejected school district's argument that failure to provide special education services did not harm student because he earned a "C").

Although regression is not required, if a student does regress or lose skills, this is an additional reason why a student may be entitled to compensatory education. See US ED's March 12, 2020 guidance. As explained in B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016), when a student loses skills they previously had, a compensatory education award would not only have to provide for reteaching the lost skills but also have to compensate for the new skills not gained. The Court gave the following example:

Imagine a student who with the benefit of a FAPE would have learned to add in month one, multiply in month two, and divide in month three. If the school system denies her a FAPE in month two in a way that not only prevents her from learning to multiply, but also causes her to lose the ability to add, a proper compensatory education award would both reteach addition and teach multiplication. Moreover, if the award did not issue until the end of month three, during which the school system had resumed providing a FAPE and taught the student how to add and multiply, but not divide, a compensatory education award aimed at teaching the student to divide would be required, as

that would be the only way to put the student in the position she would be in absent the FAPE denial.

[Id. at 798.]

18. The school district does not dispute that my child’s IEP was not fully implemented but says my child is not entitled to compensatory education because “some progress” was made. Is this correct?

Answer: Some school districts claim that the standard set by the Supreme Court in Endrew F. v. Douglas County Sch. Dist., 137 S. Ct. 988 (2017) is dispositive in instances where a district has not fully implemented the student’s IEP. Under that standard, “to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Id. at 999. IDEA defines FAPE, however, to include not only an appropriate IEP, which was the issue in Endrew F., but also requires that special education and related services be provided in conformity with the student’s IEP. 20 U.S.C. §1401(9); 34 CFR 300.17; 34 CFR 300.323(d); N.J.A.C. 6A:14-1.1(d). See Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982) (a free appropriate public education or FAPE by statutory definition requires that the special education and services are provided in conformity with the student’s IEP); Endrew F. v. Douglas Co. Sch. Dist., Re-1, 137 S. Ct. 988, 994 (2017) (same).

In L.J. by N.N.J. v. School Board of Broward County, 927 F.3d 1203, 1215-1216 (11th Cir. 2019), a failure to implement the IEP case, the court rejected the district’s argument that it must use the Endrew F. standard when there was a failure to fully implement a student’s IEP. According to the court, “in implementation cases, reviewing courts can presume that an unchallenged IEP, if adequately implemented, would offer a free appropriate public education. The unchallenged IEP thus stands as a proxy for Endrew F.’s substantive threshold, and a court is left only to determine whether the school delivered an education “in conformity with” the presumptively valid IEP.” The court found that in implementation cases, the task is to compare the services that are actually delivered to the services described in the IEP itself. Id. at 1214. It noted that the child’s actual educational progress (or lack thereof) could be evidence of the materiality of an implementation failure—

but was not dispositive. Id. See also Van Duyn v. Basker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007).

In G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608, 620 (3d Cir. 2015) and Ferren C. Sch. Dist. of Philadelphia, 612 F.3d 712, 717-718 (3d Cir. 2010), the Third Circuit stressed that compensatory education is “to place disabled children in the same position they would have occupied...by providing the educational services children should have received in the first instance.” A compensatory education standard that only requires “some benefit” or “some progress” going forward would not provide the services the students should have received in the first place and “carries no guarantee of undoing damage done by prior violations.” Reid v. District of Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005) (contrasting a standard that looks to a “child’s present abilities” as in Rowley (or Andrew F.) with the standard for examining past violations). The Reid Court went on to hold that compensatory education awards, “must do more— they must compensate.” Id. at 523. See also Boose v. District of Columbia, 786 F.3d 1054 (D.C. Cir. 2015) (an appropriate IEP going forward cannot take the place of an adequate compensatory education for past violations).

19. My district tells me that they provided services to the “maximum” or “greatest extent possible” during the COVID-19 pandemic and that is all they were required to do. Is that correct?

Answer: No. None of the IDEA or Section 504 requirements were suspended during the pandemic. On March 27, 2020, Congress gave the Secretary of Education 30 days to recommend what, if any, temporary waivers to IDEA and Section 504 requirements Congress should enact. On April 27, 2020, the Secretary of Education notified Congress that she was “not requesting waiver authority for any of the core tenets of the IDEA or Section 504 of the Rehabilitation Act of 1973, most notably a free appropriate public education in the least restrictive environment.” As the court recognized in Chicago Teachers Union v. Devos, 468 F. Supp. 3d 974 (N.D. Ill. 2020), only Congress could waive IDEA or Section 504 requirements during the pandemic and it chose not to.

US ED and NJDOE both recognized that it might not be possible to provide all IEP services during school closures. They required school districts to ensure that they provided IEP services to “the greatest extent possible” while schools were closed.

However, this was not meant to give school districts a “safe harbor” from complying with their IDEA and Section 504 obligations. In the same March 12, 2020 [guidance](#), US ED told school districts that once schools reopened, parents and their child’s IEP team would need to meet and “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.” See also US ED Office of Civil Rights, March 21, 2020 [guidance](#), p. 2; US ED, [Return to School Roadmap](#), p. 24 (noting critical importance of IEP teams making individualized decisions to “determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child’s receipt of appropriate services”). In this same guidance, US ED also said that “A determination of compensatory services by the child’s IEP Team is an appropriate proactive mitigating measure intended to address the needs of the child due to the LEA’s failure or *inability* to provide appropriate services.” Id. at 28 (emphasis added).

Similarly, NJDOE made it clear to districts that even if they provided services to the “greatest extent” or “most appropriate extent possible” during school closures, compensatory services might be warranted when the student returned to school. In its March 23, 2020 [guidance](#), NJDOE told districts that if students with disabilities did not have access to internet connectivity needed to participate in online instruction, the IEP team would need to determine what compensatory instruction the student might require when school districts reopened. In that same guidance, NJDOE said that during school closures, districts must offer special education services to the “most appropriate extent possible,” but once students returned to school, IEP teams might need to consider compensatory services on a case-by-case basis. In its April 30, 2020 [guidance](#), NJDOE told districts that the student’s IEP team, including the parent(s)/guardian(s), should decide if the student should receive compensatory education services. IEP teams were told that they didn’t need to wait until schools reopened to start considering whether compensatory education services were warranted. Concerned that students who were graduating or had turned 21 might not have received all of the services in their IEPs, in its June 12, 2020 [guidance](#), NJDOE strongly encouraged districts to meet with students and discuss the need for compensatory services beyond June 30, 2020. In a [Broadcast Memo](#) issued on March 3, 2021, NJDOE again told schools that IEP meetings should be held with the parent to determine the need for compensatory education.

In its July 27, 2022 webinar, Valerie Williams, director of the Office of Special Education Programs (OSEP), at the US Department of Education, said that “compensatory services can be necessary to address the past failure or *inability of the LEA*, or local education agency, to provide appropriate services, including those that were identified on the child’s IEP. They might also be appropriate where an SEA, or state educational agency, has found a failure or *inability to provide* appropriate services under IDEA, in order to address the needs of the child.” [US ED July 27, 2022 Transcript](#), pp. 3-4 (emphasis added).

For those students with Section 504 plans, Jasmine Bolton, the senior counsel in the Office of Civil Rights at the US Department of Education, emphasized that “if a school *couldn’t* or didn’t provide a student the education and services previously determined to be appropriate, or that would’ve been found appropriate after a timely evaluation, the school has an obligation to make an individualized determination about that student’s need for compensatory education and services.” US ED [July 27, 2022 Transcript](#), p. 6 (emphasis added).

The fact that it was not possible for school districts to provide some IEP services such as the in-person job training and community-based instruction in student’s IEPs during school closures appeared to be a strong motivator for the New Jersey Legislature to extend the age of eligibility for students who turned 21 during the 2020-2021, 2021-2022 or 2022-2023 school years with the passage of N.J.S.A. 18A:46-6.3 in June 2021. By extending the age of eligibility, it was possible for these students to remain in school while they received additional and compensatory services or transition services. See also US ED, [Return to School Roadmap](#), p. 28 (inability to provide transition services is example of when compensatory services may be necessary).

20. What if my school district claims it is not obligated to provide any compensatory education because it acted in “good faith” throughout the pandemic?

Answer: Many school districts made significant efforts during the extended school closure to implement students’ IEPs. An award of compensatory education in this circuit does not, however, require a finding of bad faith or fault on the part of the school district. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 538 (3d Cir. 1995); M.C. o/b/o J.C. v. Central Reg’l. Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996); Ridgewood Bd.

of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 246 (3d Cir. 1999). In addition, US ED has long supported the use of compensatory services “based on **any** failure or inability to provide appropriate services due to circumstances such as teacher strikes, natural disasters, and pandemics.” US ED, [Return to School Roadmap](#), p. 28 (emphasis added). In US ED’s July 27, 2022 webinar, Jasmine Bolton, Sr. Counsel in the Office of Civil Rights at US ED discussed what she described as the “myth” that a good faith effort on the part of schools eliminates the need to provide compensatory services stating that “A good faith effort to provide services is not enough to meet a school’s obligation to provide FAPE. We know that schools and districts across the nation did their best to meet students’ needs throughout the pandemic. This is not about assigning blame or fault on the part of the school or the district. It’s about remedying injuries that students experience when they do not receive the evaluations or services that they need.” US ED [July 27, 2022 Transcript](#), p.7.

21. My district says it didn’t need to provide all IEP services because I chose full-time remote learning for my child rather than hybrid or in-person instruction.

Answer: This is incorrect. New Jersey school districts were told in summer 2020 NJDOE [guidance](#) that all students had an unconditional eligibility for fulltime remote learning and that districts must offer fully remote students the “**same quality and scope of instruction**” as those receiving in-person learning were offered. For example, if the student would receive in-class support from a special education teacher if attending in-person, the student would be entitled to in-class support by a special education teacher when attending remotely.

22. My district says that students with disabilities are not entitled to any compensatory education because all students experienced some “learning loss” during the pandemic.

Answer: US ED’S Office for Civil Rights (OCR) addressed the disparate impact of COVID-19 on students with disabilities in “[Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students](#)” (June 2021), pp. 22-26. Noting that disparities in academic achievement for students with disabilities had long predated the pandemic, US ED-OCR pointed to early indications showing that the

pandemic had exacerbated academic achievement disparities for students with disabilities. In addition, according to a May 2022 research study produced by Harvard University’s Center for Education Policy Research, “The Consequences of Remote and Hybrid Instruction During the Pandemic,” the consequences of the shift to remote or hybrid instruction during 2020-21 were greater for students attending high-poverty schools and even greater when remote learning was extended for longer periods of time, as it often was in New Jersey. See [Harvard Study](#).

23. What if my school district says students with disabilities don’t need compensatory education because they can participate in remediation programs set up for all students?

Answer: School districts throughout New Jersey tried to address learning loss through such means as generic summer programs or tutoring services open to all students and by hiring general education teachers to address learning loss. Although students with disabilities are entitled to participate in all remediation programs available to other students, these programs are not the individually designed special education and related services needed to compensate students with disabilities for IEP services not provided, or not provided appropriately, after the pandemic closed school buildings in March 2020.

US ED has made clear that the “recovery services” or “COVID-19 mitigation services” that districts provide generally to all students cannot be substituted for compensatory services, which must “utilize a process identified under IDEA and Section 504 for making individualized determinations about these services based on each child’s unique needs and circumstances.” US ED, [Return to School Roadmap](#), pp. 29-30; US ED [July 27, 2022 Transcript](#), p. 7.

24. Can school districts avoid providing compensatory education by claiming the parents did not provide sufficient support for their child to learn virtually?

Answer: Parents and older siblings spent extensive time and effort trying to support students during virtual learning. They faced significant obstacles, however,

including many parents were working outside the home while numerous others did not speak English or lacked basic reading skills. If one child required support 100% of the time, this meant other children in the family were sometimes left with little to no support. In any event, it is well-established law in this circuit that “[A] child’s entitlement to special education should not depend upon the vigilance of the parents.... Rather, it is the responsibility of the child’s teachers, therapists, and administrators...to ascertain the child’s educational needs, respond to deficiencies, and place him or her accordingly.” M.C. o/b/o J.C. v. Central Reg’l, Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996); Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 250 (3d Cir. 1999); G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015).

The school district unsuccessfully raised the defense of insufficient parental support in L.V. on behalf of L. V. 2 v. New York City Dep’t of Educ., 77 IDELR 13, No. 19-5451 (S.D.N.Y. July 8, 2020), *aff’d* 2020 WL 4040958 (S.D. N.Y. July 17, 2020) when it blamed a single parent with two young children with special needs for not making herself sufficiently available to the New York City’s IT department so that they could troubleshoot the district-provided device. The court noted that “troubleshooting computer problems can take hours — hours when someone else would have to look after J.V. and his sister, which requires caretaking resources that have not necessarily been available to L.V....” See also US ED July 27, 2022 Transcript, p. 6 (noted that “counting emails or communications with parents as a service provided, or providing parents with instructions on how and when to provide a particular service...presents a serious concern, whether a district is providing special education and related aids and services that meet the individual needs of each student with disabilities.”)

In a pre-COVID-19 case, after a school district stopped providing ABA services in the home, the parent paid someone to train her to provide the services and then sought reimbursement from the school district for the services provided by the parent. The school district argued that the parent should not receive any reimbursement because she was only doing what parents are supposed to do. The Third Circuit rejected the school district’s argument, finding that “[a]lthough Congress envisioned parental involvement...Congress primarily contemplated that Bucks County would provide the early intervention services to I.D...and that her family would not have to resort to providing these services [themselves].” The Court went on to say that “[t]he level of parental involvement that Congress

intended when a state meets its burden of providing appropriate early intervention services is entirely separate from what Congress intended as a remedy when a state fails to meet that burden.” Bucks Co. Dept. of Mental Health/Mental Retardation v. Pennsylvania, 379 F.3d 61, 71-72 (3d Cir. 2004). Similarly, during the COVID-19 pandemic, school districts remained responsible for ensuring that students with disabilities’ IEPs were fully and appropriately implemented and for providing compensatory education when that did not occur.

In Buckly v. State Correctional Institution-Pine Grove, 98 F. Supp. 3d 704, 719-720 (M.D. PA 2015), the correctional institution blamed the incarcerated student for not receiving a FAPE, saying that it was his own volitional (and violent) acts that resulted in his placement in a cell for 23 hours a day and, concomitantly, his restricted educational opportunities consisting of only paper packets and occasional contact with a teacher. It argued that to provide the student with compensatory education would “reward” him and cause other inmates once released to also seek compensatory education. The court rejected the argument holding that “appropriate education under the IDEA is not a privilege to be taken away, and, on the equities, it was Defendants’ utter failure to provide Plaintiff with a FAPE that engenders an award of compensatory education. To Defendants’ concern that other inmates will seek compensatory education upon release...simply stated, future litigation can be minimized by complying with the requirements of the IDEA.”

25. How long do parents or adult students have to file due process petitions seeking compensatory education?

Answer: In 2004, IDEA enacted a statute of limitation which requires a parent to file due process within two years of when they knew or should have known about the alleged violation. 20 U.S.C. Sec. 1415(f)(3)(C). See G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015) and its discussion of IDEA’s statute of limitations. In P.P. v. West Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009), the Court held that IDEA’s two year statute of limitations applies to Section 504 claims. The actual “knew or should have known” date will vary depending on the facts specific to each parent.

On March 3, 2022, New Jersey enacted N.J.S.A. 18A:46-1.3 which extends the time for filing due process petitions seeking compensatory education due to the COVID-

19 pandemic. **The deadline for filing a due process petition to raise such claims is now September 1, 2023.** N.J.S.A. 18A:46-1.3. This means that claims for failures related to the identification, evaluation, educational placement, or the provision of a free and appropriate public education of a child with a disability during a COVID-19 school closure or a period of virtual, remote, hybrid, or in-person instruction that occurred between March 18, 2020 and September 1, 2021 will be timely if a due process petition is filed by no later than September 1, 2023.

It is unclear whether the extension of the statute of limitations will apply to claims brought under Section 504. There is language in N.J.S.A. 18A:46-1.3, however, that suggests that the limitation period was extended to September 1, 2023 not only for due process claims brought under IDEA but also for due process claims brought under “any other law, rule, or regulation..., regarding the identification, evaluation, educational placement, or the provision of a free and appropriate public education of a child with a disability during COVID-19 school closure or a period of virtual, remote, hybrid, or in-person instruction accruing between March 18, 2020 and September 1, 2021.”

Note that the extension of the statute of limitations specifically does NOT apply to those students who turned 21 during the 2020-2021, 2021-2022 or 2022-2023 school years and are covered by N.J.S.A. 18A:46-6.3 which was enacted on June 16, 2021. See Answer to Question 4 for discussion of this statute. Since it is a new law, it is unknown how courts will interpret the “knew or should have known” date. However, because the statute provided new rights to students by extending a student’s eligibility to receive additional or compensatory services from their public school for up to at least one school year, the earliest a parent or adult student could have been made aware of these new rights was June 16, 2021. This suggests, therefore, that the earliest the statute of limitations would expire **would be June 16, 2023.**