

March 18, 2021

Acting Commissioner Angelica Allen-McMillan, Ed.D.
New Jersey Department of Education
100 River View Plaza
Trenton, NJ 08625-0500

Assistant Commissioner Peggy McDonald
Division of Student Services
New Jersey Department of Education
100 River View Plaza
Trenton, NJ 08625-0500

Re: NJDOE Compensatory Education Guidance dated March 3, 2021

Dear Acting Commissioner Allen-McMillan and Assistant
Commissioner McDonald:

On February 2, 2021, New Jersey Special Education Practitioners (NJSEP), Education Law Center (ELC), SPAN Parent Advocacy Network (SPAN), and Family Voices-NJ wrote to the Governor and the Acting Commissioner to request that the New Jersey Department of Education (NJDOE, the Department, or the State) issue comprehensive guidance on the provision of compensatory education to students with disabilities and to propose essential components of that guidance. While we received no letter responding to our specific requests, we learned that Assistant Commissioner McDonald issued "Guidance Regarding Compensatory Education Determinations for Students with Disabilities as a Result of COVID-19" to local educational agencies (LEAs) on March 3, 2021 (March 3 Guidance or Guidance). Guidance from the Department has been desperately needed in the area of compensatory education for students with disabilities, and we appreciate some of the positive components of the Guidance. But, unfortunately, the March 3 Guidance does not serve the important purposes of protecting student rights and providing clarity to families and school districts. To the contrary, the Guidance creates even further misinformation and confusion. In this letter, we set forth seven key deficiencies in that Guidance that must be remedied and we implore you to take further action in accordance with our points below and our detailed February 2, 2021 letter.

1. LEAs and Parents Must Be Informed that Compensatory Education is Required When Students Do Not Receive All of the Services Set Out in Their IEPs and the Failure is More than *De Minimus*

According to the Guidance, "Students with disabilities who do 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 a free and appropriate public education (FAPE)." Another portion of the Guidance states, "the goal of compensatory education is to remedy the knowledge and skill deficits that result when missed services are determined to have caused a denial of a FAPE." Neither of these statements is the correct legal standard for awarding compensatory education when students do not receive all of their IEP-mandated services.

Failure to implement an IEP requires a different compensatory education standard than deciding whether compensatory education is warranted because the IEP did not provide a FAPE in the first instance. In the latter case, whether the IEP offered FAPE will be determined in accordance with the standard established by Endrew F. v. Douglas County Sch. Dist., 137 S.Ct. 988 (2017). The State's March 3, 2021 Guidance suggests that it is the Endrew F. FAPE standard that LEAs should use when IEPs were not fully implemented. This is incorrect, however, because for IEPs in place as of March 17, 2020, the IEP teams had already determined that students required all of the IEP services in order to receive a FAPE. Accordingly, Courts of Appeal have held that students are entitled to compensatory education if there is more than a *de minimus* failure - or, in other words, a material failure - to implement the student's IEP. A material failure exists when there is more than a *minor discrepancy* between the services a school provided to the child and the services required by the child's IEP. See, e.g., Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007); L.S. By N.N.J. v. Sch. Bd. of Broward Co., 927 F. 3d 1203 (11th Cir. 2019). As an example of a "material failure" to implement an IEP during COVID-19, in Brookings Sch. Dist., 77 IDELR 55 (SEA SD 2020), the hearing officer found that the student was entitled to compensatory education for only one day of missed special education services. It is imperative that the State set forth the correct standard for awarding compensatory education when an IEP has not been fully implemented. The State must clarify that all except very minor failures to provide IEP-mandated services will result in an award of compensatory education.

2. LEAs and Parents Must be Informed that the Third Circuit Precedent Is 1:1 relief in Compensatory Education Cases

The March 3 Guidance conveys misleading information to LEAs and parents by stating “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 disability.” While this is technically true, this is only because neither IDEA nor the State’s special education regulations explicitly address compensatory education at all. Instead, compensatory education is a judicially-created remedy, long recognized by courts throughout the country as an appropriate remedy under IDEA when students’ IEPs do not provide a FAPE or their IEPs are not fully implemented as written. Under Third Circuit case law, which governs New Jersey, compensatory education has been required to be provided on a 1:1 basis. This has been the precedent in the Third Circuit since 1990 when it issued its decision in Lester H. by Octavia P. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).

As the Court made clear in G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608 (3d Cir. 2015) (citation omitted), the remedy of compensatory education is intended to place children in the “same position they would have occupied” “by providing the educational services children should have received in the first instance.” Thus, if a student’s IEP said that the student was to receive two hours a week of speech therapy and the student received no speech therapy for eight weeks, the student is entitled to 16 hours of compensatory speech services. Similarly, students who received only paper work packets and no direct instruction by a teacher or related service provider are entitled to have those missing services made up on a 1:1 basis, absent an agreement with the parent for alternate services. See, e.g. Buckley v. State Correctional Institution-Pine Grove, 98 F. Supp. 3d 704 (M.D. PA 2015) (student awarded full days of compensatory education for each school day during which he received only paper work packets and an occasional opportunity to ask teacher questions but no instruction).

NJDOE’s suggestion to LEAs that missed services should not be made up on a 1:1 basis not only conflicts with Third Circuit caselaw, but will promote both inequity and greater litigation. Discouraging 1:1 services is inequitable for parents who lack the wherewithal to litigate their children’s compensatory education claims. At the same time, parents who are informed about the Third Circuit’s position on compensatory education will be more likely to litigate denials of 1:1 services by LEAs.

This does not mean, with the consent of the parents, that the IEP team cannot determine alternate services that would put the student where he or she would have been had the services been provided in-person as set out in the IEP. It does mean, however, that the 1:1 make up of missed services should be presumed in the absence of a consented-to alternative.

3. IEP Meetings to Consider Compensatory Education For All Students With Disabilities Must be Mandated by a Date Certain Before the End of the 2020-21 School Year

As detailed in our letter of February 2, both federal and state guidance have recognized that many students will need compensatory education services arising from the pandemic, due to school building closures and an inability of many schools to implement some or many IEPs remotely over varying periods of time. Despite the fact that there are students throughout the state who have not received the special education and related services set out in their IEPs for some or all of the pandemic, the March 3 Guidance does not compel action by the LEAs that NJDOE oversees.

The language of the March 3 Guidance does not require LEAs to determine the need of every student with a disability for compensatory education, nor to do so within a specific timeframe. Instead, the Guidance merely suggests that IEP teams "should utilize the next virtual or in-person IEP meeting, or a meeting once in-person instruction resumes" to discuss missed services and determine the need for compensatory education. For LEAs to know that these meetings and determinations are mandatory for all students with disabilities, the March 3 Guidance must be revised to say that IEP teams "must utilize" an upcoming meeting to make a compensatory education determination. This is critical for all students but most significantly for students who are 21 years of age. As of the end of June, these students will no longer be eligible for an IEP but may still be entitled to compensatory education services. We propose that IEP teams be required to utilize "the next virtual or in-person IEP meeting" or, if none is upcoming, that they be required to schedule "a meeting once in-person instruction resumes" or "a meeting before the end of the 2020-21 school year," whichever occurs first. The IEP meeting notice to parents should also indicate that the student's need for compensatory education will be discussed.

After more than a year since school buildings first closed, every New Jersey student with a disability is entitled to a

determination as to that student's need for compensatory education before the end of this school year. If in-person services are still not available at the time of the meeting, then an initial determination of what is needed can be made, with a subsequent implementation made once in-person learning has resumed.

4. Both Denials and Approvals of Compensatory Education Must be Documented in Writing and Notice Must List All Reports, Evaluations, and Assessments the IEP Team Relied Upon in Making its Decision

Throughout the March 3 Guidance, NJDOE has required LEAs to document compensatory education guidance only "if the IEP team proposes changes to the student's IEP" (p. 1), and "if compensatory education is required" (p. 2). While the Guidance does note that parents may seek dispute resolution "if there is disagreement with the IEP team's determination that the student does not require compensatory education" (p.2), the Guidance does not clearly require LEAs to document such denials in writing. Instead, by focusing only on the need for documentation if compensatory education is awarded, the Guidance sends the message that documentation is not needed when compensatory education is denied. This omission must be remedied. In addition, the written notice must list all reports, evaluations, and assessments that the IEP team relied upon in making its decision with regard to compensatory education.

5. LEAs must be Required to Submit Written Compensatory Education Plans to NJDOE for Approval

In our letter of February 2, we clearly set forth NJDOE's obligation and ultimate responsibility to ensure that all students with disabilities in the state receive a FAPE. NJDOE cannot satisfy its legal duties by merely suggesting to LEAs that they make compensatory education determinations and then taking no further action to ensure that this happens. In the interests of transparency, accountability, and protection of student rights, NJDOE must require LEAs to submit and make public their plans for providing compensatory education to their students. By requiring these plans to include estimated costs, NJDOE can also ensure that funds from the American Rescue Plan are made available to LEAs when needed.

Further, the requirement for submission of a plan can be used to ensure that LEAs are addressing all categories of compensatory education that may be needed due to the pandemic:

when the student's IEP services were not provided at all or for the frequency or duration set out in the IEP; when virtual or online learning was substituted for in-person learning and was not appropriate for the student as demonstrated by, among other things, the student's lack of expected progress on IEP goals and objectives as well as a student's skill or knowledge loss; and where evaluations were not completed on a timely basis and students were subsequently found eligible for special education and related services.

Finally, the submission of a plan can be used to monitor that LEAs have reached all students who require compensatory education, that compensatory education services are being implemented within a reasonable timeframe, that blanket services are not offered across the board without accounting for students' individualized needs, and that compensatory education is being provided outside of the regular school day unless the parent consents otherwise.

6. LEAs and Parents Must Be Informed That Learning Loss and Recovery Services Offered to All Students Don't Replace Students With Disabilities' Rights to Compensatory Education

The March 3 Guidance indicates that learning loss and recovery service programs "may provide additional opportunities for compensatory education." These programs should be open to students with disabilities but it is important to clarify that LEAs cannot use them to take the place of compensatory education services.

7. An Expedited Hearing Track Must be Established for Compensatory Education Disputes

The March 3 Guidance refers parents to dispute resolution options, such as mediation conferences and due process hearings, to resolve disagreements over compensatory education without recognizing that the current hearing process is subject to systemic delays. Since the remedy of compensatory education is intended to place children in the "'same position they would have occupied'" "by providing the educational services children should have received in the first instance," G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 608 (citation omitted), there is little question that students should have access to that remedy as soon as possible. Losses suffered during the pandemic will merely be compounded if students cannot receive a timely remedy. Given the systemic delays that currently exist at

the Office of Administrative Law, the only way to ensure that disagreements over compensatory education are decided in a timely manner is to establish an expedited hearing track for those cases.

Conclusion

NJSEP, ELC, SPAN, and Family Voices-NJ stand ready to answer any questions or discuss our proposals in greater detail. We foresee numerous problems and massive violations of student rights unless NJDOE's March 3 compensatory education guidance is promptly revised to address the concerns we have raised. We hope that you will appreciate the need for further action and we thank you for considering the corrective action that we urge in this letter.

Respectfully,



Elizabeth Athos, Esq.
ELC Senior Attorney & NJSEP
Moderator

s/Rebecca Spar

Rebecca Spar, Esq.
ELC Trustee & NJSEP Member

Via Electronic Mail

Cc: Office of Governor Murphy
Attorney General Gurbir S. Grewal
Senator Stephen M. Sweeney
Assemblyman Craig J. Coughlin
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Senator Dawn Marie Adiego
Senator Nellie Pou
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