
February 2, 2021

The Honorable Phil Murphy, Governor
Office of the Governor
P.O. Box 001
Trenton, New Jersey 08625

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

Re: Compensatory Education for Students with Disabilities

Dear Governor Murphy and Acting Commissioner Allen-McMillan:

We write this letter to request State assistance to children with disabilities on behalf of New Jersey Special Education Practitioners (NJSEP), an association of over 100 attorneys and advocates who represent parents and students with disabilities in special education matters, Education Law Center (ELC), a leading advocate for New Jersey public school children, SPAN Parent Advocacy Network (SPAN), a nonprofit advocacy organization which houses New Jersey's Parent Training and Information Center, and Family Voices NJ, a family-led organization of family and friends of children and youth with special health care needs and disabilities.

We salute the State for addressing so many challenges on so many fronts during this unprecedented pandemic. Adapting to the pandemic has been an ongoing process, and some consequences, such as interruptions to in-person learning, have persisted far longer than anyone ever expected. We know that you share our concern for the impact of the pandemic on vulnerable students with disabilities and expect that you are working toward solutions. With that understanding, we offer our perspective - through the requests and recommendations set forth below - on the steps needed to minimize and repair the harm to students with disabilities resulting from the pandemic.

Our Requests and their Rationale

We request that the New Jersey Department of Education (NJDOE) issue comprehensive guidance on the provision of compensatory education to students with disabilities and we propose essential components of that guidance. We also request that school districts and other local educational agencies (LEAs) be required to prepare plans to operationalize the guidance with input from parents, adult students, and other stakeholders, and to submit those plans to NJDOE for approval and for posting on their websites. Our third request is that NJDOE monitor districts and other LEAs to ensure they are complying with the guidance and their approved plans and take any necessary steps to enforce compliance. Fourth, we request that the State establish an expedited hearing track to resolve disagreements regarding compensatory education. Our fifth and final request is that the State provide the necessary resources for these tasks during the upcoming budget season.

The United States Department of Education (USED) and NJDOE have both recognized: (1) despite the COVID-19 pandemic, students with disabilities are still entitled to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and to implementation of their Individualized Education Programs (IEPs); and (2) if it is not possible to fulfill these requirements during school closures, then IEP Teams would need to meet and determine the need for compensatory education services. To date, however, the State has not issued any comprehensive guidance to define the standard and procedures IEP Teams must use in determining whether a student is entitled to compensatory education, the information and data the IEP Team must collect and consider, the factors to be used in determining the amount of compensatory education, and the parameters for providing compensatory education services. We are concerned that the lack of comprehensive guidance will lead not only to wide disparities in implementation among schools, but also to numerous disputes that will overwhelm an already fragile special education hearing system. To avoid these outcomes, as well as to provide desperately needed compensatory education to students with disabilities, we urge the State to act immediately by issuing comprehensive guidance in line with our recommendations below and established Third Circuit law.

Background

Pandemic-related disruptions to, and delays in, providing educational services have occurred throughout the country and

are indisputable. In New Jersey, as a result of the Governor's executive orders, all schools were closed for in-person instruction from March 18, 2020 through the end of the 2019-20 school year. The 2020-21 school year has seen the continuation of remote¹ instruction for many students, particularly those in larger urban areas. To the extent that in-person instruction has been offered by some districts during 2020-21, it is usually a hybrid of in-person and remote instruction, and even that has been subject to frequent closures. Since March 18, 2020, most schools have offered, at most, four hours of instruction per day. In addition, by the time the pandemic is under control and all schools fully reopen, many students with disabilities will not have had access to all of the special education and related services set out in their IEP for over a full school year. Others will have had access to only a portion of the special education, related services and accommodations/modifications contained in their IEPs. Some students, due to the nature of their disabilities, compounded in some cases by their young age, have not been able to learn from the virtual or online platforms offered to them. Students without computers/laptops or adequate and reliable access to the internet have been left with paper packets, often with only an occasional telephone call or email from a teacher.

Despite pressure to waive IDEA mandates during the COVID-19 pandemic, Congress and USED decided to leave all IDEA mandates in place, including the requirements to provide FAPE, to implement IEPs, and to conduct timely evaluations.²

On March 12, 2020, USED issued guidance requiring schools to ensure that students with disabilities continue to receive FAPE and have equal access to the same opportunities as the

¹ We are defining "remote learning" as when the learner and the instructor or source of information, are separated physically – this includes "online learning" as well as lower-tech remote learning options (e.g. T.V., radio, electronic communications).

² Former United States Secretary of Education Betsy DeVos notified Congress in her Report to Congress dated April 27, 2020 that her Department was not asking to waive "any of the core tenets of the IDEA..." (p. 11) (available at https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=). Congress, to date, has accepted that recommendation.

general education population during school closure. Schools were told that they must continue to provide the special education and related services set out in the students' IEPs or Section 504 plans to the greatest extent possible.

On March 21, 2020, USED said that schools could provide, as appropriate, special education and related services through remote instruction provided virtually, online, or telephonically. Where technology itself imposed a barrier to access, schools were told that they must provide equally effective alternative access to the curriculum or services provided to other students. Id. Finally, USED made it clear that when schools reopened, they would need to determine whether the student was entitled to compensatory education services, including to make up for any skills that may have been lost. See also March 12 and 16, 2020 USED guidance.

NJDOE issued guidance in which it also stressed that schools must continue to meet their legal obligation to provide FAPE and that they must ensure that the services implemented were "properly individualized" and were those "most appropriate" for the student. NJDOE emphasized that services were to be consistent with the child's IEP "to the most appropriate extent possible" while school facilities were closed. Schools were also told to consult with parents to ensure that students had the necessary supports in place and could gain equitable access to instruction. See March 23, April 3 and April 13, 2020 NJDOE guidance.

In addition, NJDOE told schools in guidance issued on March 23, April 13, and April 30, 2020 that when school facilities reopened, IEP teams would need to determine whether the student was entitled to compensatory education services and whether the student's IEP needed to be adjusted accordingly. Schools were further told that compensatory education services were an individual determination, on a case-by-case basis, by the child's IEP Team, which included the student's parent(s)/guardian(s). In its April 30, 2020 guidance, the State told schools that IEP Teams should begin then to consider whether compensatory education services were needed. However, NJDOE has not provided guidance on any of the specifics for undertaking this work and has not uttered the word "compensatory" since last June. To our knowledge, the State has taken no steps to ensure that compensatory education meetings are indeed being held by IEP Teams in New Jersey schools.

Defining Compensatory Education

As an initial matter, it is critical for the State to define compensatory education services and to distinguish those services from general education recovery support and new IEP services. General education recovery support refers to the services that some states are providing to all students - both with and without disabilities - to address educational and social-emotional needs arising from the pandemic, and we strongly encourage New Jersey to develop separate guidance to address those needs. New IEP services simply refer to the services that must be added to the Individualized Education Programs of students with disabilities to address any new areas of disability-related need.

By contrast to these other categories, compensatory education services are provided when the student's IEP did not offer a FAPE to the student or when IEP services were not provided at all or for the frequency or duration set out in the IEP. Particular to COVID-19, compensatory education may also be provided when virtual or online learning was substituted for the in-person learning set out in the IEP and it 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. Students whose evaluations were not completed on a timely basis and were subsequently found eligible for special education and related services may also be entitled to compensatory education. See, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238 (3d Cir. 1999)

Compensatory education has been long recognized by courts as an appropriate remedy under IDEA when students have been denied a FAPE or IEPs are not fully implemented as written. Under Third Circuit case law, which governs New Jersey, compensatory education "'aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of IDEA,' by providing the educational services children should have received in the first instance." G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608 (3d Cir. 2015) (citation omitted).

The Third Circuit's definition of compensatory education must be clearly spelled out in the State's guidance. While some states have attempted to distinguish COVID-19 compensatory education from compensatory education awarded by courts, such an effort would be misguided for several reasons: 1) there has been

no waiver of IDEA rights during the pandemic so the failure or inability to provide a FAPE or fully implement IEPs must be treated the same as pre-pandemic failures; 2) doing so will lead to inequitable results for parents who are incapable of litigating their children's compensatory education claims; and 3) the use of separate standards is only likely to lead to less clarity and more litigation which everyone wants to avoid.

Courts have also established certain principles that must be memorialized in guidance: 1) compensatory education services cannot interfere with or change a student's least restrictive environment; and 2) compensatory services must be provided in addition to the student's IEP services. This means that, in virtually all cases, compensatory education services must be provided outside of the regular school day unless the parent consents otherwise.

There are two other key elements in defining compensatory education consistent with Third Circuit case law. First, if a student has lost skills the student possessed as of March 18, 2020, that student would be entitled to compensatory education services needed to regain those lost skills. Regression/recoupment is not, however, the relevant standard. Whether a student is expected to experience the regression of skills over school breaks that will not be recouped within a reasonable time once school has resumed is the standard for determining if a student needs an extended school year. This is a separate and distinct determination under IDEA from the compensatory education awarded when an LEA has not provided FAPE or fully implemented a student's IEP.

Second, when a student has been deprived of FAPE, or IEP services have not been provided at all or have been provided in an amount less than required by a student's IEP, compensatory education should 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).

Procedures for Making Compensatory Education Determinations

To ensure that students with disabilities receive the compensatory services to which they are entitled, we urge the State to clearly spell out mandatory procedures for LEAs to follow.

First, the State should instruct LEAs to undertake an affirmative and individualized determination related to each student. This means that each LEA must initiate this process by a set date, as opposed to awaiting parental requests or requiring parents or guardians to file a state administrative complaint or a due process petition. This also means that LEAs must not create blanket rules offering a set amount of compensatory services to all students, or to subsets of students with disabilities such as those with specific disabilities or in specific placements.

Second, as with all determinations under IDEA, parental input is important and parent information, observations and concerns must be considered in determining whether or not compensatory education services are owed, the quantity of compensatory education, and how it will be delivered. Parent involvement is even more critical during COVID-19, as parents have often been the ones with the most direct contact with the student during the remote school days.

Third, compensatory education decisions, including how the compensatory services will be provided, must be made at an IEP Team meeting that includes the parent or, with parental consent, following IDEA's procedures for amending an IEP without a meeting.

Fourth, the State should provide direction that the information and data to be collected and considered by the IEP Team should include, but not be limited to:

- How were the services provided (online, synchronous or asynchronous, use of Google classroom, etc.; in-person; by phone; work packets; other) and the frequency/duration of each;
- Did the student have the technology (in terms of connectivity, reliability, affordability and quality) needed for the virtual, online learning offered by the district;
- If the student did not have the needed technology, what equally effective alternatives were used?
- If work packets were the sole or primary form of instruction, what was the manner, duration and frequency of contact between the child and his/her teacher;
- Were translation and interpreter services provided for students and families who needed them and were learning materials and tools in a language the student and parent could understand;

- How many hours of active instruction were provided each day;
- What services and accommodations/modifications are required by the student's IEP, including the frequency and duration for each;
- Which services and accommodations/modifications in the student's IEP were not offered or not offered for the required frequency or duration;
- Did the student's disabilities and other factors such as age make it difficult if not impossible to access all the services, and if so, which services could not be accessed;
- Levels of academic and functional performance and progress on IEP goals and objectives as of March 18, 2020;
- Data collection including any screenings or assessments and student's progress on IEP goals and objectives and in general education subjects as well as any loss of academic and non-academic skills since March 18, 2020;
- Information and observations of teachers, services providers, provider agencies, including early intervention providers and pre-employment transition service providers; and
- Information and observations of parents, caregivers, childcare providers and family members.

Fifth, the State should set timeframes for making compensatory education determinations. We believe that the State should not wait until schools fully reopen to require schools to begin meeting with IEP Teams, including the parent, and making compensatory education determinations covering the period up to the date of the IEP meeting. This will enable IEP Teams to determine what compensatory education the student is entitled to as of that date.

Sixth, parents must be given the option of deciding to wait to implement the compensatory education services until the services can be provided in-person.

Finally, the State must establish the student populations to be prioritized in the scheduling of IEP meetings to discuss compensatory education. We recommend that each of the following groups of students be prioritized:

- Students who have aged out or graduated since the pandemic started or will age out or graduate in 2021-22;
- Students who could not engage in remote learning due to their disability-related needs;

- Students who lacked access to remote learning due to lack of technology or adequate internet connections;
- Students whose IEPs were not fully implemented; and
- Students whose eligibility evaluations or initial IEPs have been delayed or interrupted.

Within each of these groups, we further recommend the prioritization of students who are homeless, dually identified as English Language Learners, or involved in the child welfare or juvenile justice systems.

Factors for Determining Compensatory Education to be Provided

The State needs to ensure that IEP Teams make compensatory education determinations based on consistent, relevant factors, including, but not limited to:

- If IEP services were not provided at all or were not provided in the amount required by the student's IEP, then LEAs must provide the services that were missed on a 1:1 basis.
- If the student was unable to access the services offered, then LEAs must provide the services that could not be accessed on a 1:1 basis. However, with the written consent of the parents, the IEP Team can 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.
- If the student lost academic or non-academic skills that the student possessed as of March 18, 2020 due to the failure to offer FAPE or to fully implement the IEP, then LEAs must offer compensatory education services needed to put the student back to where he or she was as of March 18, 2020, as well as to make up services that were not provided or that could not be accessed after March 18, 2020.

Disputes over Compensatory Education

The State's guidance should require LEAs to inform parents that they retain all their procedural safeguards, including the right to file for mediation or due process if the parent disagrees with the IEP Team's decision concerning compensatory education. Given the systemic delays that currently exist at the Office of Administrative Law, we recommend that the State establish an expedited hearing track to resolve disagreements related to the need for compensatory education services or the amount of compensatory education services offered.

Other Circumstances on Which Guidance is Needed

In addition to providing the general guidance set forth above, we recommend that the State's guidance address all of the following particular circumstances:

- Establishing which LEA is responsible for determining and providing compensatory education when a student moves from one LEA to another during the pandemic;
- Determining and providing compensatory education services for students in out-of-district programs;
- Assessing the need for transportation to access compensatory education services; and
- Denoting which funds are available to deliver compensatory education services.

The State's Obligation to Ensure FAPE

IDEA expressly places the ultimate responsibility on States to ensure that all students with disabilities are provided with FAPE. 20 U.S.C. § 1412(a) and (a)(1). Moreover, the State's obligation to ensure that children with disabilities receive FAPE has been reinforced through case law in this Circuit dating back to 1980. See, e.g., Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980); Kruelle v. New Castle County Sch. Dist., 642 F.2d 697, 697-98 (3d Cir. 1981); M.A. v. State-Operated School Dist. of Newark, 344 F.3d 335, 340 (3d Cir. 2003).

Because of this well-settled obligation, the State must do more than simply issue the comprehensive guidance needed. First, NJDOE must require all LEAs to develop plans to operationalize the guidance with the input of parents, adult students, and other stakeholders. Second, NJDOE must review and approve those plans and require LEAs to post them on their websites. Third, NJDOE must monitor to confirm that LEAs comply with the guidance by implementing their approved plans and must investigate and correct complaints of LEA failure to do so. Fourth, NJDOE must establish and maintain a timely process for the resolution of compensatory education disputes. Finally, the State must ensure that NJDOE and the LEAs have the resources necessary to accomplish these tasks. Without taking these additional steps, the State cannot fulfill its duty to protect the rights of all New Jersey students with disabilities under IDEA.

Conclusion

NJSEP, ELC, SPAN, and Family Voices stand ready to work with the State in developing the comprehensive guidance recommended above, including meeting with State representatives. However, given the urgent needs of New Jersey's students with disabilities, we ask for your affirmative commitment by March 1 to move forward with the issuance of comprehensive guidance by April 1, 2021.

Thank you for your attention to this critical matter and your anticipated cooperation in addressing the pressing need for consistent, specific, systemic guidance in the area of compensatory education for students with disabilities and for the statewide implementation of that guidance.

Respectfully,



Elizabeth Athos, Esq.
ELC Senior Attorney & NJSEP
Moderator

s/Rebecca Spar

Rebecca Spar, Esq.
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Via Electronic Mail

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