

FAQ on Compensatory Education in Response to COVID-19

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FAQ on Compensatory Education in Response to COVID-19

(October 8, 2021)

By Rebecca K. Spar, Esq.¹

What is compensatory education?

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) have been violated. Although IDEA's statute and regulation do not specifically refer to compensatory education, IDEA grants courts 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).

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." US ED, [Return to School Roadmap](#), pp. 25-26.

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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 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); Ferren C. Sch. Dist. Of Philadelphia, 612 F.3d 712, 717-718 (3d Cir. 2020).

Common instances a student receives compensatory education:

- When a school district² knew or should have known a student's Individualized Education Program (IEP) did not provide a free appropriate public education (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); G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608 (3d Cir. 2015)(same); US ED, [Return to School Roadmap](#), p.27 ("if the special education and related services that were provided during the pandemic through virtual, hybrid, or in-person instruction were not appropriate to meet the child's needs").
- 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").
- 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.
- 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

² 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); Independent School District No. 283 v. E.M.D.H., No. 19-1269 & 19-1336, U.S. App. LEXIS 17448 (8th Cir. June 3, 2020) (court rejected school district’s argument that it could not evaluate student because she wasn’t attending classes in-person, finding 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 (“if the initial evaluation, eligibility determination, and identification, development and implementation of the IEP for an eligible child were delayed”).

- 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. 2014) (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).

In addition to public school districts and charter schools, in New Jersey, approved private schools accepting placements of students with disabilities from public school districts must also 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., 2021 U.S. Dist. LEXIS 17689, No. 19-20655 (D.N.J. January 29, 2021).

Students who turn 21 years of age or are issued a diploma are still entitled to compensatory education for prior FAPE violations because it only provides the student what they should have received before they turned 21 years of age or received a high school diploma. 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); US ED, [Return to School Roadmap](#), p. 30 (noting that compensatory services for these students “could take the form of an additional period of eligibility”). This means that those students who turned 21 years of age by June 2020 or who were issued high school diplomas in June 2020 may still raise compensatory education claims as long as they do so in compliance with IDEA’s two-year statute of limitations. 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) (not published).

A student is also 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).

Will all students with disabilities be entitled to compensatory education because they did not receive in-person services during the pandemic?

Not necessarily. If the student received all of the services set out in his/her/their IEP virtually and is in the same position as if the services had been provided in-person, the student would likely not be entitled to compensatory education. Federal and state guidance both indicated that virtual services, instead of in-person services, could be provided "as appropriate" for the student.

What if a school district provided all of the services, accommodations and modifications in a student's IEP virtually but some or all of the virtual services were not appropriate for the student?

The student should be entitled to compensatory education on a 1:1 ratio for those virtual services that were not appropriate for the student. Both US ED and New Jersey Department of Education (NJDOE) said that when school facilities were closed due to COVID-19, school districts could provide special education and related services instruction virtually, online or telephonically, but only "*as appropriate.*" (US ED [guidance](#), March 21, 2020; NJDOE [guidance](#), April 3, 2020) 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).

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

No. In deciding whether an award of compensatory education is warranted for not fully implementing a student's IEP, most courts have held that there must be more

than a *de minimis* failure to implement the IEP. Courts of Appeals have found a material failure exists when there is more than a *minor discrepancy* between the services 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) (only providing three to five hours of math instruction when IEP called for eight to ten hours was a material implementation failure). The Van Duyn court emphasized that no demonstrable harm was required although student's actual progress, or lack of progress, might be probative of whether the discrepancy was "material." In L.S. By N.N.J. v. Sch. Bd. of Broward Co., 927 F. 3d 1203, 1214 (11th Cir. 2019), the court found that the student's progress or lack thereof was merely one piece of evidence to use in determining if the failure to implement was material.

Although 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 has said in two unpublished decisions that more than a *de minimis* failure to implement an IEP is needed for a compensatory education award. 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.

How is the amount of compensatory education determined when a school district does not fully implement a student's IEP or virtual instruction was not appropriate for the student?

Courts 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.)

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 the residential placement the district agreed he needed. 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 IEP did not provide FAPE); 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.F. v. Cent. Dauphin Sch. Dist., 765 F.3d 260 (3d Cir. 2014), the Court upheld the hearing officer's award of 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) (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., No. 04-1381, 2009 WL 1971329 (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 (M.D. PA. 2015) (student awarded full days of compensatory education for each school day during which 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).

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."

Courts have held that some students may need 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 "counter productive" 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 neither federal nor state special education regulations even refer to compensatory education, much less set out how a compensatory education award is to be calculated. However, in fulfilling their role of interpreting legislative intent, courts have developed compensatory education as an equitable remedy. 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.

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

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 8 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.

Who will determine whether a student is entitled to compensatory education?

US ED and NJDOE have said that the student's IEP team, including the parent and student (when appropriate), should meet and make an individualized decision as to what compensatory education the student is entitled to and how it should be provided. See NJDOE guidance, [March 23, 2020](#) and [April 13, 2020](#); US ED guidance, [March 12, 16](#) and [21](#), 2020. Specifically, the IEP team 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.

IEP teams must give parents proper written notice of their decision and if parents do not agree with the IEP team decision, they may file mediation only, due process or a complaint investigation request.

There is no legal requirement that parents must first go through their child's IEP team before filing due process or mediation only seeking compensatory education. Not doing so, however, would likely require a hearing with witnesses and considerable delay before any decision is issued which might be avoided if the child's IEP team agrees that compensatory education is warranted.

When can compensatory education be provided?

Compensatory services must be in addition to the IEP services a student is entitled to receive through his/ her/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. In some cases, courts have found that a private placement is an appropriate form of compensatory education. See, e.g., [Draper v. Atlanta Indep. Publ Sch.](#), 518 F.3d 1275 (11th Cir. 2008) (upheld compensatory education award of four years of private school tuition).

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).

My district tells me that COVID-19 was a national health disaster and they provided services to the “maximum” or “greatest extent possible” which is all they were required to do. Is that correct?

No. 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 it 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 have both recognized that it might not be possible to provide all IEP services during school closures. In its March 12, 2020 [guidance](#), US ED told school districts that parents and their child's IEP team will 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 March 21, 2020 [guidance](#); 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 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. 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.

The fact that it was not possible for school districts to provide all 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’s passage of S 3434 in June 2021. S 3434, codified as N.J.S.A. 18A:46-6.3, extended the age of eligibility for students who otherwise would have aged out of IDEA eligibility in June 2021, 2022, or 2023, allowing those students to remain in school while they received compensatory and additional 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).

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

Many school districts made significant efforts during the extended school closure to implement students’ IEPs. An award of compensatory education 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 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). Thus, a student may be entitled to compensatory education even when the school district acts in good faith.

What if a student was without the needed computer or other device or internet needed to access virtual instruction? What if a student had a device and internet access but was still given activity sheets or work packets with minimal to no interaction with a teacher or related service provider?

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, 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 [Supplemental Fact Sheet](#): "Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," US ED Office for Civil Rights (March 21, 2020), US ED 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 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. 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.

Does a student need to regress or lose skills they had when school facilities closed and not recoup the lost skills within a reasonable time in order to be entitled to compensatory education?

No. There is no precedent in this or other circuits for using regression and the failure to recoup lost skills within a reasonable time as the standard for 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. 2020). Linking a student's entitlement to compensatory services to whether the student regresses and doesn't recoup skills within a reasonable time could never result in placing students in the same position they would have occupied but for the district's violations of IDEA. At most, all it could do would be to return the students to where they were before the school district stopped providing the required IEP services. It would not provide the educational services that the students should have received in the first instance as both G.L. and Ferren require.

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").

If a student does 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 he/she/they previously had, a compensatory education award would not only have to provide for reteaching the lost skills but also 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.]

What if a student did not receive all of their IEP services but the school district argues the student is not entitled to compensatory education because they made some progress on their IEP goals and objectives?

The Third Circuit Court of Appeals has recognized that in evaluating the appropriateness of a student's IEP, it is reasonable to consider the student's progress under that IEP. See D.S. v. Bayonne, 602 F.3d 553, 567 (3d Cir. 2010). When there is more than a *de minimis* failure to implement the student's IEP, however, the district's violations of IDEA are not excused even if the student still made "some progress." This is because IDEA defines FAPE to include not only an appropriate IEP, but also special education and related services provided in conformity with the IEP. 20 U.S.C. Sec. 1401(9); 34 CFR 300.17; 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 definition requires that the special education and services are provided in conformity with the student's IEP); Andrew F. v. Douglas Co. Sch. Dist., Re-1, 137 S.Ct. 988, 994 (2017) (same).

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. 2020), 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 alone cannot take the place of an adequate compensatory education); L.J. v. School Board of Broward County, 927 F.3d 1203, 1215-1216 (11th Cir. 2019) (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 Andrew 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).

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

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.

My district says that students with disabilities are not entitled to any compensatory education because all students experienced some “learning loss” as a result of the pandemic. 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?

Available data suggests that many students experienced some “learning loss” in reading and math during the pandemic. Recently, though, US ED’S Office for Civil Rights (OCR) addressed the disparate impact of COVID-19 on students with disabilities. See [Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students](#) (June 2021), pages 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.

School districts throughout New Jersey are addressing 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 2020.³

US ED has made clear that the “recovery services” or “COVID-19 mitigation services” that districts provide generally to all students cannot simply be substituted for compensatory services, which must “utilize a process identified under IDEA 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.

What if my school district claims it is not obligated to provide any compensatory education because parents did not complain about the services provided during the pandemic?

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 (3d Cir. 1999); G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015).

³ Governor Murphy ordered New Jersey schools to close by March 18, 2020 and did not lift that order until August 13, 2020. See Executive Orders 104 and 175. Many schools closed for in-person instruction effective March 16, 2020.

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

The school district unsuccessfully raised this argument 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...."

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 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, 379 F.3d 61, 71-72 (3d Cir. 2004). Similarly, during COVID, school districts remain responsible for ensuring that students with disabilities' IEPs are fully and appropriately implemented and for providing compensatory education when that does not occur.

Are students whose evaluations for eligibility were delayed entitled to compensatory education?

Yes, if it is eventually determined that the student is 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 he/she/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).

Can parents select the person who will provide the services and schedule the services at a time convenient for the parent and student?

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 (3d Cir. 2010); D.E. v. Cent. Dauphin Sch. Dist., 765 F.3d 260 (3d Cir. 2014); D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488 (3d Cir. 2012). If an IEP team is willing to use private providers for the compensatory services, the team may be amenable to allowing parents to select from several approved providers. 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.

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

Compensatory education can 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., 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).

If the student is over 21 years of age and the student is awarded compensatory education, can the school district be obligated to develop an IEP for the student?

In Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712 (3d Cir. 2010), the Court found that despite a student no longer being of school age, the court had the authority to

order the school district to reevaluate the student, develop an IEP and serve as the student's local education agency during the three years of compensatory education delivery. The Court recognized that this kind of relief would only be granted in a case-by-case basis when needed to fully compensate the student for past violations and to develop an appropriate equitable award. In the Ferren case, the private school that the parties agreed could appropriately implement the compensatory education services required an IEP and involvement of the local school district.

How long do parents have to file due process petitions seeking compensatory education?

In 2004, IDEA enacted a statute of limitation which requires parents to file due process within two years of when they know 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. For example, if a student's IEP provided for a speech-language therapy and the parent knew or should have known that the school district should have provided the speech-language therapy even after school facilities closed on March 18, 2020, the parent should plan to file due process no later than March 17, 2022.

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