

Compensatory Education Issues in Special Education

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Compensatory education is both a hot topic in special education and flash point for school district liability. This article discusses the triggers for an award of compensatory education, how an award is calculated and how compensatory education is implemented.

1. What is the quantum of educational benefit of the Individualized Education Program ("IEP") necessary to satisfy IDEA?

IDEA calls for more than a trivial educational benefit and requires a satisfactory IEP to provide **significant learning** and to confer **meaningful benefit**. The Third Circuit rejects the notion that what is appropriate can be reduced to a single standard, holding the benefit must be gauged in relation to the child's potential.¹ The district must give adequate consideration to the student's intellectual potential in deciding whether the IEP is appropriate. It must analyze the type and amount of learning of which the student is capable.

2. What is the standard for a student's entitlement to compensatory education? Stated differently, what is the threshold of deficiency in the school district's stewardship necessary to trigger an award?

The trigger is whether the district knows or should have known its IEP failed, that the student's IEP is not providing an appropriate education.² The Third Circuit specifically rejected the standard that the parents must demonstrate the district's bad faith or egregious conduct. The court said, "a child's entitlement to special education should not . . . be abridged because the [school] district's behavior did not rise to the level of slothfulness or bad faith."³

3. What are the deficiencies in an IEP that may trigger compensatory education?

- Annual goals and short term learning objectives are not appropriate because they fail to address an identified need. For example, despite a student's identified need for extensive remediation in written expression, the only writing goal in the IEP is that the student will write a research report with no more than seven errors.
 - The IEP fails to include goals designed to address identified needs.
 - The IEP does not contain measurable annual goals or short-term learning objectives that make it possible to assess progress towards those goals. IEPs cannot be so general and subjective that it is not possible to tell what the student is expected to accomplish in one year's time or how his or her progress towards the goals will be measured.
 - A student's behaviors (e.g. inattention and failure to complete work) interfere with learning, but there is no functional behavior assessment undertaken and the IEP fails to acknowledge the need for, or include, a behavior management plan.
 - The IEP fails to include a program of systematic **instruction** designed to teach the student to learn homework completion, organization, student skills, generalization of skills, or peer interaction and communication.
 - Failure to implement provisions in the IEP or to obtain required consultation services.
 - The IEP's specifically designed instruction and related services fail to align with the needs emphasized in the Comprehensive Evaluation Report ("CER").
 - Failure to mainstream a student with serious emotional disturbance in regular classroom; failure to include behavior management plan; failure to conduct neurological evaluation to determine any effect from a known head injury; and failure to provide services of specialists recommended in CER.

4. In what way is compensatory education an outgrowth of the equitable theory of tuition reimbursement?

Like retroactive tuition reimbursement, compensatory education requires school districts to pay belatedly expenses that they should have paid all along. Courts have reasoned that the child's entitlement to a *free* appropriate education was not intended to turn upon the parents' ability to "front" its costs. If a parent cannot afford to withdraw a student, enroll him/her in a private school (upfront the costs), and then seek reimbursement, the child should not be deprived of an adequate education. This is the theory that extends tuition reimbursement to compensatory education.

5. How is compensatory education computed?

The district is required to make up for the deprivation. In order to bring relief for the previously denied necessary services, compensatory education must be in addition to what the district must already provide in the current IEP. Compensatory education may not supplant necessary special education and related services. The hearing officer or panel determines for what period Free Appropriate Public Education ("FAPE") has been denied. The hearing officer or panel awards the number of hours of service that should have been provided, ranging from a full day for disabilities that permeated the school day to the number of hours that a specific service should have been provided.

For example, in Special Education Opinion No. 1227, the Panel determined that Andrew O. had been denied FAPE since the inception of the first IEP on January 4, 2000. The district's failure to address Andrew's needs in attention, organization, study skills and his specific learning disabilities in written expression and math calculation was determined by the Panel to permeate every aspect of his school day. As a result, it ordered 6 hours per day (excluding days he was absent from school) from January 4, 2000 to the date an appropriate program is developed. This award encompassed three school years (1999-2000, 2000-2001, 2001-2002). After this appeal was decided, the Commonwealth Court imposed a one- to two-year period of limitation. (See *question 8*.)

An example of how a hearing officer awarded the number of hours of specific services follows. In this proceeding, the hearing officer determined the 504 service plan to be inadequate and not fully implemented in addition to concluding the student was eligible for an IEP. The hearing officer estimated that missing accommodations would account for approximately one hour each of the student's school days so that the district was required to provide the student with one hour of compensatory education for each day it failed to provide him with accommodations for the school year from a starting point of one year before the hearing was requested. The hearing officer calculated a minimum number of 180 days of instruction and a one-year period of deprivation equaling 180 school days. Between the date of the filing for due process and the date by which the services could be implemented was an additional 70 days. This combined to a total of 250 school days that the student had not received the complete set of accommodations that he is entitled to. With an estimate of one hour per day of deprivation as the equivalent of the time that the student should have received, the district was required to provide the student with 250 hours of compensatory education for its failure to either provide him with the services contained in his service contracts or to fully implement his service contracts.

In addressing the time period for the district's failure to provide specially designed instruction to address his needs, the hearing officer "split the baby." The earliest allowable starting date for the commencement of the specially designed instruction was one year before the due process hearing was filed or December 2001. A later date of October 2002 could be considered based on the district's knowledge beginning with the parents' April 2002 request for an Independent Educational Evaluation ("IEE") and allowing for completion of the evaluation. The hearing officer concluded that the start of the 2002-2003 school year was a reasonable starting date for the compensatory education. He concluded that the deficiencies or those elements that should have been required to be included in the Student's IEP were equivalent to two 45-minute individual sessions per week provided by a special education teacher. With the period of deprivation beginning at the start of the 2002-2003 school year and continuing through the date by which this decision must be implemented, the period of deprivation was estimated at 140 school days or 28 weeks. For its failure to provide 90 minutes of specially designed instruction per week for 28 weeks, the hearing officer awarded 42 additional hours of compensatory education.

6. Is there any mitigation or reasonable time to respond allowed to the school district?

Yes. A school district is responsible to correct the deficient IEP. However, the court excludes the time

reasonably required for the school district to rectify the problem. The hearing officer must define the reasonable time within which the district should have done something about it. Compensatory education should accrue from that point forward.⁴

In Special Education Opinion No. 1224 (April 1, 2002), the panel deliberated how to determine what was a reasonable time to remedy. Part of the allowable time included a two-month period when the district asked for permission to evaluate. Because the student's program included homebound education as prescribed by a physician, the panel reasoned that the home-based programming would have been provided as part of transitioning back to school. The panel allocated two months of transitioning. In addition, the panel concluded that the parents contributed to the confusion and delays in the case.

Although there is a split in the panels, this panel included Perry Zirkel, who wrote an article that the Third Circuit explicitly recognized in *M.C.* That article said that applying the equities "is fact specific, depending on the conduct of not only the defendant-district, but also the plaintiff-parents." *M.C.* eliminated parent passivity from the equation, that is, the child's entitlement should not be determined by the parents' aggressive objection to the IEP. The panel reasoned that although IDEA encourages vigorous parental involvement, it does not encourage unreasonable conduct that precludes the district from developing or delivering the IEP. A recent district court decision interpreted *M.C.* to permit an equitable consideration of parental misconduct in delaying the district's remedial action. That court applied the *M.C.* approach but because of inequitable parental conduct offered no compensatory education.⁵

Finally, the panel in Special Education Opinion No. 1224, subtracted some of the services rendered by the district from the award. In total, the panel reduced the actual amount of compensatory education for each of the following: (a) reasonable rectification (two months), (b) transition time (two months), (c) the equities (two months), and (d) services already delivered (three months).

7. After the hours are determined, how is compensatory education implemented?

The parents may decide how the hours should be spent so long as they take the form of appropriate developmental, remedial or enriching instruction that furthers the goal of the student's IEP. Such hours must be in addition to the student's then current IEP, if any, and may not be used to supplant such services. These services may occur after school hours, on weekends and during the summer months.

The costs to the district of providing the awarded hours of compensatory education should not exceed the full cost of the services that were denied. Full costs are the salaries and fringe benefits that would have been paid to the actual professionals who should have provided the district services and the actual costs for salaries, tuition and transportation for contracted services. This sets the maximum cost of all the hours or days of instruction of compensatory education awarded. Persons outside the school district may provide the services. The parents may balance expensive and inexpensive instruction or services so that the average cost is below the maximum amount. The parents also may use fewer hours of expensive services so long as the maximum amount is not exceeded. The parents may not be required to make copayments or use personal insurance to pay for these services. (See, e.g. Special Education Opinion No. 1227 (April 9, 2002)).

8. Is there a time limitation on the amount of compensatory education?

Commonwealth Court has determined that claims for compensatory education must be limited to one year prior to the date that the due process hearing was requested unless mitigating circumstances warrant a delay, in which case compensatory education may be awarded for a maximum of two years.⁶ As stated by the court in *Carlynton*,

In *Montour*, we held that there was generally a one-year statute of limitations in compensatory education cases. It was determined that a party could only challenge the one-year period prior to the date a due process hearing was requested. However, in cases where a party could establish mitigating circumstances for a delay in requesting a due process hearing, a maximum of two years prior to the date a due process hearing was requested could be challenged.

9. May related services be part of a compensatory education award?

Yes. The Panel in Special Education Opinion No. 1029 (July 13, 2000) determined the absence of visual therapy

("VT") as a related service in a student's IEPs dated December 1998 and March 2000 rendered those IEPs inappropriate. The panel relied on unchallenged visual evaluation reports of two experts, and the unrebutted live testimony of one of the experts, that VT was necessary to correct the functional visual problems that impeded the student's learning since she began her education. According to the panel, the district refused to provide the VT services without ever initiating an investigation of the student's need for VT. By failing to diagnose known visual defects and needs as part of the evaluation process and then to address the identified needs, the district offered an inappropriate IEP. The district defended unsuccessfully by arguing that VT was an excluded medical service. The panel rejected this argument using the *Cedar Rapids* bright line test because the VT is provided by a non-physician, trained specifically to implement the optometrist's recommendation.⁷ The district presented no evidence from an ophthalmologist challenging the effectiveness of the therapy.

Part one of the compensatory education was to reimburse the student's mother for the cost of the visual therapy provided to her daughter for the time she provided the service. Importantly, the Panel described not only the non-responsiveness of the district's behavior but also its misleading nature. In contrast to the district's delay tactics, the panel refers to the dilemma of the parent relying on the best information available that her child needs the service to benefit from her education. Part two of the compensatory education awarded was equal to the amount of school days from March 1999, when the parent advised the principal that she mistakenly believed that VT was to be part of the IEP, until the parent began the VT in February 2000. The compensatory time was to be delivered in a timely fashion pursuant to an appropriate IEP over the summer months, evenings or weekends as determined by the IEP team.

10. Does compensatory education end when the child reaches age 21?

No. A court award of compensatory education may require a school district to provide education past a child's 21st birthday to make up for any earlier deprivation.⁸ While extending services beyond age 21 may be desirable in some cases, it is not a remedy that is equitable in all cases. A student may no longer need or want the services after graduation or age 21 but may still have been denied FAPE and therefore may be entitled to compensatory education. In these cases, compensatory education must necessarily allow for compensation with something other than replacement of previously necessary special education and related services so long as it is not post secondary. (See *Special Education Opinion 1219*.)

11. What type of compensatory education could be awarded after graduation?

In a recent Commonwealth Court decision, *Susquehanna Township SD v. Jelani J.*, 823 A.2d 249 (Pa. Cmwlth. 2003), the court awarded full tuition and fees at a college preparatory academy that provided a post-high school year. The failure to implement the IEP related to promised transitional services in the "senior year" IEP in the nature of a college preparatory program. The parents objected to graduation in 2002 on the ground that the post-secondary transitional services had not been provided. In response to the objection of the parents, the IEP team reconvened and wrote a new IEP that specified different transitional services in the nature of a special education placement for the Student and listed a new graduation date as of 2003. The court asserts that the change of transitional services was done without consulting the parents or obtaining their consent. The parents disapproved the 2002 IEP on the basis that it no longer contained the transitional services set forth in the 2001 IEP. On this set of unique facts, the Commonwealth Court determined that the student's attendance at the academy was a proper remedy for the district's failure to provide the transitional services in the 2001 IEP. The court concluded that the 2001 IEP demonstrated the district intended that the student receive educational benefit he would derive from a post-high school year in a college preparatory program. The court concludes, "having been deprived of such an opportunity by the district, the student has a statutory right to receive the educational benefit by means of compensatory education." The court limited the panel's award to one year of tuition and fees.

12. Must the parent object to the IEP or lack of an IEP to create the right to compensatory education?

No. In Pennsylvania, a child's entitlement to appropriate special education does not depend upon the vigilance of the parents.

13. Does the award of compensatory education apply for years in which a disabled student received an inappropriate education via means other than an IEP?

The denial of an appropriate education—and not merely the denial of an appropriate IEP—creates the right to compensatory education.⁹ A child ultimately identified as eligible for an IEP may receive compensatory education for time in regular education □

1 *Polk v. Central Susquehanna I.U.*, 853 F.2d 171 (3d Cir. 1988).

2 *Carlisle Area S.D. v. Scott P.*, 62 F.3d 520 (3rd Cir. 1995).

3 *M.C. v. Central Regional S.D.*, 81 F.3d 389 (3rd Cir. 1996).

4 *M.C.*, supra.

5 *D.B. v. Ocean Township Bd. of Ed.*, 985 F. Supp. 457, 537 (D.N.J. 1997), *aff'd mem.*, 159 F. 3d 1350 (3rd Cir. 1998).

6 *M.C.*, supra.

7 *D.B. v. Ocean Township Bd. of Ed.*, 985 F. Supp. 457, 537 (D.N.J. 1997), *aff'd mem.*, 159 F. 3d 1350 (3rd Cir. 1998).

8 *Montour SD v. S.T.*, 805 A.2d (Pa. Cmwlth. 2002); *Carlynton SD v. D.S.*, 815 A.2d 666 (Pa. Cmwlth. 2003).

9 In *Cedar Rapids Comm SD v. Garret F.*, 526 US 66 (1999), the U.S. Supreme Court held that "medical services" which are excluded as a related service under IDEA are only those services that must be performed by a physician.

10 *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990).

11 *M.C.*; *Ridgewood Board of Ed.*, supra.