

## YOUR STUDENT'S RIGHT TO COMPENSATORY EDUCATION

August 2022

### WHAT IS COMPENSATORY EDUCATION?

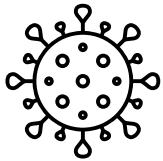
If your child with a disability has been denied needed educational services required by law, your student is entitled to make-up educational services, or **compensatory education**.<sup>1</sup> Compensatory education is an equitable remedy, which means it is based on the **idea of fairness**.<sup>2</sup> Compensatory education is meant to put a student in the same position they would be in if the school had provided appropriate special education and supports in the first place.<sup>3</sup> Because of that, compensatory education is highly individualized and broadly flexible to the needs of your student.<sup>4</sup>



These services occur outside the regular school day and **do not** replace a student's regularly scheduled programming or any component of the student's Individualized Education Program (IEP) or Accommodations or Section 504 plan. They can be awarded by administrative hearing officers, state educational agencies, or IEP teams, or by agreement with your school district, charter school, or other local educational agency.<sup>5</sup>

### WHEN IS MY STUDENT OWED COMPENSATORY EDUCATION?

If your student has disabilities and was not provided appropriate services and supports for some time, that likely entitles your student to compensatory education services. Compensatory education can be awarded to a student at any age, even if the child is over 21.<sup>6</sup>



Barriers related to the COVID-19 pandemic, including virtual instruction, frequent periods of quarantine, and teacher absences, do not excuse a school from providing necessary services and supports. In fact, the U.S. Department of Education has emphasized that school districts and IEP teams are responsible for assessing and addressing learning loss that stems from the pandemic.<sup>7</sup>

There are multiple ways that your student could be deprived of a free appropriate public education (FAPE) and thus be entitled to compensatory education, including:

#### 1. Your student's IEP was inappropriate to meet her needs.



##### Look out for:

- Lack of progress in school<sup>8</sup>
- Lack of connection between the IEP and current evaluations
- Missing, inappropriate, or poorly written goals
- Repetition of the same goals for multiple years
- Wrong or very old *present* levels of performance

## 2. Your student's IEP was not carried out as written.

This happens when a school fails to provide some or all the services or supports listed in an IEP.<sup>9</sup> If part of your student's IEP could not be fully implemented during the pandemic—for instance, if occupational therapy services were not provided because they could not be administered virtually—that would also qualify your student for compensatory education.

## 3. Your student experienced an illegal delay in receiving a special education evaluation, reevaluation, or IEP and missed out on needed services as a result.<sup>10</sup>

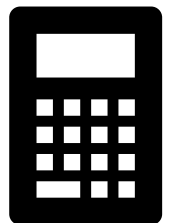


### Consider the following:

- Did the school fail to address obvious signs that your student needed to be evaluated or reevaluated for special education services?<sup>11</sup>
- Did the school refuse to initially evaluate your student upon request, ignore an oral request for an evaluation, or wait more than 60 days to fulfill your request?
- Was your student initially evaluated and found eligible for special education services, but the school failed to develop an IEP within 30 days or implement an IEP within 10 days?
- Did the school fail to reevaluate your student within three years of the previous evaluation, or two years if your child has intellectual disabilities?

## 4. You were not given a chance to fully participate in the development of your student's IEP, and your student's IEP was inappropriate to meet her needs as a result.<sup>12</sup>

This may occur because you were not invited to the IEP meeting, or the school failed to provide an interpreter for a multilingual caregiver acting as the child's IDEA parent. The IDEA parent must be provided with the opportunity to participate in IEP meetings.



## HOW SHOULD COMPENSATORY EDUCATION BE CALCULATED?

### 1. Calculate the baseline compensatory education owed by determining the amount of missed instruction and related services your child should have received.

If your student had an appropriate IEP or 504 plan but her school did not follow it:

- ✓ Review your student's IEP or 504 plan and determine how many hours of each type of service your student should have received during the time period at

issue. Make sure to account for both the duration of the services and their intervals. If services are listed “per term,” that means per year.

- ✓ Review documentation of what services your student actually received.
- ✓ Subtract the number of hours of special education and related services that your student received from the total number of hours your student was entitled to, based on their IEP. That number represents the minimum number of hours of compensatory education that you should demand for your student.

If your student's IEP or 504 plan was not appropriate to meet their needs:

- ✓ Consider what additional services and supports your student should have been receiving to meet their educational needs. This can be determined by looking at a revised copy of your student's IEP or 504 plan that you feel is finally appropriate.
- ✓ Compare the amount of each type of service your student should have been receiving to the services they actually received. That number represents the minimum number of hours of compensatory education that you should demand for your student.

## 2. Consider whether additional hours should be added to the baseline

Did the deprivation of appropriate special education or related services effectively prevent your student from participating in, or benefiting at all, from the education that they were offered?

- If so, you should request that the compensatory education award be calculated based on missing entire school days.<sup>13</sup>

Did your student's general or special education teacher consult with board-certified specialists about your student as needed?

- If not, you can argue that the services your student received from that teacher were not appropriately administered and can demand additional hours of compensatory education.

Does your student need transportation to and from the school or other service location where compensatory services are administered?

- If so, you should ask for additional hours to account for transportation time. The school is responsible for paying all transportation costs.

Other factors that can be taken into consideration include:

- ✓ present levels of performance
- ✓ present rate of progress
- ✓ previous rates of progress
- ✓ evaluation results
- ✓ evaluation delays
- ✓ *any other relevant information*

3. Multiply hours of services owed by the hourly rate of \$65 or other market rate in your area to calculate the total compensatory education award.

#### HOW CAN COMPENSATORY EDUCATION BE USED?

- Compensatory education awards can be spent on a wide range of special education and related services. That includes academic, emotional, and behavioral services and supports, as well any transportation services that are needed to facilitate those services. That also includes purchasing books, school supplies, and technology, and paying for the cost of new evaluations or assessments.
- If you paid for instruction and services for your student while they were denied a FAPE from their school, you can also use compensatory education funds to reimburse yourself.<sup>14</sup>

#### HOW DO I REQUEST COMPENSATORY EDUCATION?

- You may first wish to make a request to your student's IEP team **in writing and within two years** of when you knew or should have known that your student was being denied a FAPE.
- If you do not feel your student's IEP team has sufficient data to determine the type and amount of compensatory education your student needs, it may be helpful to request an evaluation or reevaluation before making specific compensatory education demands.

#### WHAT CAN I DO IF THE SCHOOL DOES NOT AGREE TO PROVIDE COMPENSATORY EDUCATION WHEN REQUESTED?

The school must give you the written notice – the Notice of Recommended Educational Placement or Prior Written Notice, also known as a NOREP/PWN – explaining the decision not to provide compensatory education. If this happens, you can fight the decision by asking for mediation, filing a complaint with the Bureau of Special Education Appeals, or requesting a special education hearing. You can learn more about these steps in ELC's [Resolving Special Education Disagreements fact sheet](#).

The Education Law Center-PA (ELC) is a nonprofit, legal advocacy organization with offices in Philadelphia and Pittsburgh, dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, community engagement, and policy advocacy, ELC advances the rights of underserved children, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, multilingual learners, LGBTQ students, and student children ren experiencing homelessness.

ELC's publications provide a general statement of the law. However, each situation is different. If questions remain about how the law applies to a particular situation, contact ELC's Helpline for information and advice – visit [www.elc-pa.org/contact](http://www.elc-pa.org/contact) or call 215-238-6970 (Eastern and Central PA) or 412-258-2120 (Western PA) – or contact another attorney of your choice.

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- <sup>1</sup> See *Miener By & Through Miener v. State of Mo.*, 800 F.2d 749, 754 (8th Cir. 1986) (asserting that compensatory education is the appropriate remedy for a student denied FAPE).
- <sup>2</sup> See *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1128 (10th Cir. 2008) (explaining that “a district court may grant equitable relief to remedy a demonstrated violation of IDEA,” but it “may also choose to withhold relief despite a demonstrated . . . statutory violation if it has a valid basis in equity for doing so).
- <sup>3</sup> See *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 518 (D.C. Cir. 2005) (compensatory education should “aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA”).
- <sup>4</sup> See Office of Special Educ. Programs, Opinion Letter (Apr. 19, 2018) (state educational agencies can order compensatory education whenever they determine that such relief is appropriate, based on the particular facts of a case).
- <sup>5</sup> The Office of Special Education Programs has emphasized that IEP teams may be best suited to design compensatory education decisions and awards. See Office of Special Educ. Programs, Opinion Letter (Jan. 10, 2022); see also *Metropolitan Sch. Dist. of Pike Twp.*, 121 LRP 9939 (SEA IN 02/26/21).
- <sup>6</sup> See *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 718 (3d Cir.2010) (“[A]n individual over [twenty-one] is still eligible for compensatory education for a School District’s failure to provide a FAPE prior to the student turning twenty-one”). For students over the age of 21, awarding compensatory education will typically involve extending their educational services for a certain amount of time after his or her 22nd birthday. See *Pihl v. Massachusetts Dept of Educ.*, 9 F.3d 184, 185 (1st Cir. 1993).
- <sup>7</sup> See U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (Mar. 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.
- <sup>8</sup> See *Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 573 (E.D. Pa. 2013), *aff’d in part*, 581 F. App’x 141 (3d Cir. 2014) (need for compensatory education is evaluated based on whether the student’s IEP provided her a “meaningful educational benefit”).
- <sup>9</sup> However, the failure to implement an IEP as written must be material to support an award of compensatory education. *E.g.*, *Shaun M. ex rel. Kookie v. Hamamoto*, No. CV 09-00075 DAE, 2010 WL 346451, at \*2 (D. Haw. Jan. 27, 2010). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007).
- <sup>10</sup> See *Carrie I. ex rel. Greg I. v. Dep’t of Educ.*, Hawaii, 869 F.Supp.2d 1225, 1247 (D. Haw. 2012) (“The lack of assessments alone is enough to constitute a lost educational opportunity”).
- <sup>11</sup> See *Heather D. v. Northampton Area Sch. Dist.*, 511 F. Supp. 2d 549, 556 (E.D. Pa. 2007) (awarding compensatory education in part based on a district’s failure to evaluate the student despite obvious indications that the student needed additional educational support). *But see D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 251 (3d Cir. 2012) (finding that the district was not required to conclude that a first-grade student’s “misbehavior denoted a disability or disorder because hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years”).
- <sup>12</sup> See *Sch. Dist. of Philadelphia v. Post*, 262 F. Supp. 3d 178, 195 (E.D. Pa. 2017) (finding that compensatory education was an appropriate remedy in part because the student’s parents were excluded from the special education process and this exclusion contributed to a denial of FAPE).
- <sup>13</sup> See *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F.Supp.2d 427, 438-39 (E.D. Pa. Aug. 6, 2013) (establishing that when student makes extremely limited academic progress, this can indicate a district’s failure to address her needs during entire school days and warrants calculating compensatory education services based on missing full days of instruction). See also *Penn Trafford Sch. Dist. v. C.F. ex rel. M.F.*, Civ. No. 04-1395, 2006 WL 840334, \*9 (W.D. Pa. Mar. 28, 2006) (awarding full days of compensatory services where an IEP “failed to confer any meaningful educational benefit” for a period of time).
- <sup>14</sup> See *I.K. ex rel. E.K. v. Sylvan Union Sch. Dist.*, 681 F.Supp.2d 1179, 1192 (E.D.Cal. 2010) (“Appropriate relief under the IDEA can include . . . reimbursement for the cost of services that a school wrongfully failed to provide.”)