

WEBINAR MATERIALS

**“Ins and Outs of Compensatory Education
for Students with Disabilities”**

February 10, 2010

Presenters:

Jennifer Lowman, Esq. And Maura McInerney, Esq.
Staff Attorneys - Education Law Center - PA



Jennifer Lowman, Esq., is an attorney and Director of Client Services and Training at the Education Law Center-PA (ELC). ELC is a non-profit legal advocacy organization dedicated to ensuring that all of Pennsylvania's children have access to a quality public education. Ms. Lowman's work at ELC currently involves updating and writing publications for parents and professionals about the legal rights of public school students, doing trainings, and answering questions from callers to ELC's Information and Referral service.

Ms. Lowman has worked at ELC for over eight years representing public school students and parents in special education cases, school discipline matters, enrollment cases, and other school-related matters. She previously was an associate at the Dechert law firm in Philadelphia, and she taught Legal Research and Writing at the Temple University James E. Beasley School of Law. She graduated from Harvard Law School in 1996 and from Lehigh University in 1993.



Maura McInerney, Esq., is a Staff Attorney at the Education Law Center – PA. Her education law practice focuses on the legal rights of students in foster care, including issues relating to educational stability, appropriate school placement, special education and credit transfer/graduation requirements. Maura is involved in policy work at both the state and local level on behalf of educationally at-risk students. She has been a litigator in the private and public sectors for almost twenty years. She has conducted numerous trials and appeals at the federal and state level and has also litigated special education matters.

Maura previously clerked for U.S. Court of Appeals for the D.C. Circuit and was an Assistant Attorney General for the State of Maryland. Prior to entering law school, she worked at Covenant House in New York City. In 1990, she co-founded a transitional housing program in Columbia, M.D. which continues to provide housing, legal support and social services for homeless families. Maura is currently a member of the Board of Directors of the Presbyterian Children's Village, a residential treatment facility in Pennsylvania.

The Advocate Academy® is a project of

The **Advocacy**
INSTITUTE

**A not-for-profit organization dedicated to services and projects
that work to improve the lives of children, youth and adults with disabilities.**

www.AdvocacyInstitute.org

The Ins and Outs of Compensatory Education for Students with Disabilities



Education Law Center

Education Law Center-PA

www.elc-pa.org

Jennifer Lowman, Esq.

Maura McInerney, Esq.

February 10, 2010

1

Overview – Part I - Generally

- ▣ What is Compensatory Education?
- ▣ Legal Basis for Comp. Ed.
- ▣ When Is Comp. Ed. Available?
- ▣ How Is Comp. Ed. Calculated?

2

Overview – Part II – The Details

- ▣ Special Circumstances & Current Trends
- ▣ Statute of Limitations Issues
- ▣ Scope of Its Use
- ▣ Strategic Use of Comp. Ed. in Litigation
- ▣ Drafting a Comp. Ed. Provision
- ▣ Practical Tips & Best Practices

3

What is Compensatory Education?

- An essential remedy for a child with a disability:
 - Who has been denied a free appropriate public education (FAPE); OR
 - Whose procedural rights under the IDEA have been significantly violated.
- **Purpose:** To enable the child to make the progress that **she would have made** had she received an appropriate program.

4

What is Compensatory Education?

- “[N]ot a contractual remedy, but an equitable remedy,” part of the court’s resources in crafting relief under the IDEA.
 - *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994).
- Involves “discretionary, prospective, injunctive relief crafted by a court to remedy ‘an educational deficit’ created by an educational agency’s failure over a given period of time to provide a FAPE to a student.”
 - *G ex rel. RG v. Ft. Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003).

5

Compensatory Education ≠ Punitive Damages

- Services “make up/compensate” for educational deficit caused by deprivation of FAPE.
- “Replaces” educational services the child should have received in the first place.
 - “Individualized” remedy
 - Goal is to put disabled child **in the same position** he would have occupied **but for** the IDEA violations (i.e., services to allow the child to make the progress he would have made with an appropriate program)
 - See, e.g., *M.C. v. Central Reg’l Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008); *Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

6

Statutory & Regulatory Basis for Compensatory Education

- The Individuals with Disabilities Education Act (IDEA) authorizes a court to grant **“such relief as the court determines is appropriate”** for LEA’s violation of IDEA. See 20 U.S.C. § 1415(i)(2)(c)(iii).
- Federal Regulations:
 - 34 C.F.R. § 300.516(c)(3)(school-aged and preschool);
 - 34 C.F.R. § 303.424 (birth to 3)(provides for civil action but does not specify that courts may grant appropriate relief).
- State laws

7

Genesis of Comp. Ed. As a Remedy Under the IDEA

- In *Sch. Comm. of Burlington v. Dept. Educ. of Mass.*, 471 U.S. 359 (1985), U.S. Supreme Court held that IDEA relief may include retroactive tuition reimbursement for parents who place child in private school rather than accept a deficient IEP.
- Most circuit courts have explicitly extended the reasoning in *Burlington* to include providing “compensatory education services.” See *G ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308-09 (4th Cir. 2003) (collecting cases).
 - Reasoning: If retroactive tuition reimbursement is appropriate relief, the services themselves must also be made available. Entitlement to FAPE should not depend on parents’ ability to “front” costs.

8

State Laws Addressing Comp. Ed.

- **Tennessee:** Administrative determination shall require school system to take corrective action **“including compensatory education where appropriate”** for violation that denies FAPE. T.C.A. § 49-10-604(3).
- **New Hampshire:** Failure to comply with Dep’t of Ed. order resulting from complaint, due process hearing, or monitoring action may include “[d]irectives ordering specific corrective or remedial actions including compensatory education.” N.H. Rev. Stat. § 186-C:5(V)(e)(4).
- **Kentucky:** Expressly states that mediation may address compensatory education. See 707 Ky. Admin. Regs. 1:340 § 9(7).

9

Other Remedies Under the IDEA

- Reimbursement
- Other Equitable Remedies/Prospective Relief
- Attorneys' Fees
- Money Damages
 - **NOT available for IDEA violations under § 1983.** See, e.g., *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d. Cir. 2007).
 - Compensatory & punitive damages are NOT available remedy under IDEA directly in all circuits that have decided the issue. See *Chambers v. Sch. Dist. of Phila.*, 587 F.3d 176, 185-86 (3d Cir. 2009) (collecting cases); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 124-26 (1st Cir. 2003).

10

Comp. Ed. Available Under Section 504

- Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination on the basis of disability in programs that receive federal funding.
- Since Section 504 expressly allows for equitable relief, see 42 U.S.C. § 2000d-7(a)(2), compensatory education is also an appropriate remedy under Section 504:
 - See, e.g., *Barr-Rhoderick v. Bd. of Educ. of Albuquerque Pub. Schs.*, 2005 WL 5629693, at *14 (D.N.M. Sept. 30, 2005) (plaintiff had standing to seek compensatory education under Section 504 even though the alleged violation was limited to the first six school days); *Neena S., ex. rel. Robert S. v. School Dist. Of Philadelphia*, 2009 WL 2245066, at *11 (E.D. Pa. July 27, 2009) (plaintiffs entitled to the **same compensatory education** under Section 504 as awarded under the IDEA, and therefore they were prevailing parties under Section 504.)

11

A Note About State Law:

- State statutes, while often mirroring federal IDEA provisions, may also create or limit rights and state case law may opine on different standards governing comp. ed. awards.
- State law may create a right to compensatory education in other contexts:
 - For example, state case law may recognize a right to compensatory education services for a gifted child under state law. See, e.g., *York Suburban Sch. Dist. v. S.P.*, 872 A.2d 1285, 1287 (Pa. Cmwlth. 2005).

12

When is Comp. Ed. Available: Rowley's FAPE Analysis

- Comp. ed. is available if LEA failed to provide a Free Appropriate Public Education (FAPE).
- Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), established a two part "test" for FAPE determination:
 - Has the school district complied with the procedures required by the IDEA? **and**
 - Is the IEP *reasonably calculated* to enable the child to receive *some educational benefit*?

13

FAPE Standard: Majority View

- Rowley test – Does education provide *some educational benefit*?
 - 1st Cir: **Some educational benefit, but not optimal.** Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18 (1st Cir. 2008) (the Rowley standard);
 - 7th Cir: Hjortness v. Neenan Joint Sch. Dist., 507 F.3d 1060 (7th Cir. 2007).
 - 8th Cir: M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455 (8th Cir. 2008).
 - 9th Cir: J.L. v. Mercer Island Sch. Dist., ___ F.3d ___, 2010 WL 103678 (9th Cir. Jan. 13, 2010). Ninth Circuit recently ruled that changes to IDEA in 2004 did NOT replace Rowley standard governing FAPE. [9th Cir. amended and superseded its decision in J.L. and M.L. ex rel. K.L. v. Mercer Island Sch. Dist., 575 F.3d 1025 (9th Cir. 2009).]
 - 10th Cir: **"more than *de minimis*," but "some progress" enough.** Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143 (10th Cir. 2008)*
 - 11th: C.P. v. Leon County Sch. Bd., 483 F.3d 1151 (11th Cir. 2007).

14

FAPE Standard: Other Circuits

- More "liberal" standard:
 - **"Meaningful Educational Benefit" – 3rd and 6th Circuits:**
 - An "appropriate" program is one that provides "significant learning," and is reasonably calculated to confer "meaningful educational benefit," and that benefit "must be gauged in relation to the child's potential." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999). See also Deal v. Hamilton County Bd. Educ., 392 F.3d 840, 861 (6th Cir. 2004).

15

FAPE: State Laws Defining FAPE

- **California:** In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a free appropriate public education **only if the procedural violation did any of the following:**
 - (A) Impeded the right of the child to a FAPE
 - (B) Significantly impeded the opportunity of the parents to participate in the decisionmaking process regarding the provision of a FAPE
 - (C) Caused a deprivation of educational benefits.

See Cal. Educ. Code § 56505(f)(1)-(2).
- State statutes with similar provisions: Kan. Stat. Ann. § 72-973(g)(1)-(2); Md. Code Ann., Educ. § 8-413(g)(1)-(2); N.C. Gen. Stat. Ann. § 115C-109.8(a); Or. Rev. Stat. § 343.167(3); Wis. Stat. Ann. § 115.80(b)-(c). Others have adopted this language in regulations. 92 Neb. Admin. Code Ch. 55, § 008.02-03; N.J. Admin. Code § 6A:14-2.7(k).

16

Examples of Failure to Provide a FAPE

- Failure to identify the child's disability accurately and failure to provide an IEP that meets the child's actual needs. See, e.g., *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008).
- Failure to provide program that allowed child to make progress denied the child a FAPE because child required teaching in very discrete lessons. *S.A. v. Riverside Delanco School Dist. Bd. of Educ.*, 2006 WL 827798 (D.N.J. Mar. 30, 2006).
- Failure to implement a child's IEP. [But see next slide.]
- Failure to support child appropriately in the LRE. See, e.g., *P. v. Newington Bd. Of Educ.*, 546 F.3d 111, 123 (2nd Cir. 2008) (affirming comp. ed. award in mainstreaming case that required school district to hire an "inclusion consultant" for at least one year to ensure FAPE).

17

Warning: Not Every Failure to Implement IEP Results in Denial of a FAPE

- Failure to implement IEP must be a "**material failure**;" minor discrepancies between the services provided and the services called for do not give rise to IDEA violation. *Van Duyn v. Baker Sch. Dist.* 5], 502 F.3d 811 (9th Cir. 2007).
 - Rather, IDEA violation requires failure to implement an "**essential element**" of IEP (one necessary for child to receive educational benefit). *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003).
 - **Minority Rule:** Compensatory education award is appropriate only for "gross violations" of IDEA. *Somoza v. N.Y. City Dept. of Educ.*, 538 F.3d 106, 109 (2d Cir. 2008) (quoting *Garro v. Conn.*, 23 F.3d 734, 737 (2d Cir. 1994)).

18

Procedural Violations May Also Support a Comp. Ed. Award

- The standard is deprivation of a FAPE, not any IDEA violation. Thus, compensatory education is available to remedy a **procedural violation only if it caused a substantive deprivation of a FAPE:**
 - Prevented the student from benefitting from the education/denied educational opportunity; or
 - "Seriously" deprived parents of participation rights.

19

Procedural Violations May Trigger Comp. Ed. Award: Examples

- No IEP Team meeting is convened to develop IEP after child found eligible. The procedural violation deprived student of educational opportunity and denied parents meaningful participation. *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001) (affirming award of reimbursement of private school placement).
- School officials overlook clear signs of disability and are negligent in failing to order testing or seek consent to evaluate or there is no rational justification for deciding not to evaluate. *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307 (6th Cir. 2007) (affirming finding that FAPE was denied for over two years due to failure to refer child for evaluation; court remanded case to craft appropriate compensatory education award).

20

Summary: When Compensatory Education Is and Is Not Available

- Available:
 - Inappropriate IEP (program or placement);
 - Failure to implement all or essential part(s) IEP;
 - Failure to develop an IEP after child is found eligible;
 - Procedural IDEA violations that result in substantive harm; or
 - Serious violations of parents' participation rights.
- Not Available:
 - Child received a FAPE despite procedural violation (*e.g.*, delay in reevaluation yet child still received FAPE during period of delay);
 - Child received a FAPE despite minor errors/omissions in IEP;
 - Child received educational benefit from IEP but IEP did not provide the best services/placement or those preferred by the parent;
 - Minor violations of parents' participation rights;
 - FAPE is denied but child no longer qualifies as a child with a disability in need of special education [Comp Ed ≠ Punitive].

21

How Comp. Ed. Is Calculated: Hour-for-Hour Approach

- Third Circuit standard commonly results in (but does not require) award of **hour-for-hour or day-for-day makeup services**.
 - Child is "entitled to compensatory education equal to the period of deprivation excluding the time reasonably required for the school district to rectify the problem." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999).
 - Lauren P. v. Wissahickon Sch. Dist., 310 Fed. Appx. 552 (3d Cir. 2009) (affirming compensatory education award of number of school days denied appropriate education minus days student was absent).

22

How Comp. Ed. Is Calculated: Flexible Qualitative Approach

- Other circuits have increasingly rejected day-for-day/hour-for-hour calculations and instead adopted a more **flexible approach**.
- **Rationale:** The purpose is to *compensate* - Some students may need short intensive compensatory program while others may need extended program that would exceed the hour-for-hour replacement of the period denied a FAPE. Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 2005).
- **Important Limitation:** IHO cannot delegate to IEP Team power to terminate, reduce, or determine when compensatory education is no longer needed. See Reid; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307 (6th Cir. 2007).

23

Judicial Reasoning Supporting Qualitative Approach: D.C. Circuit

- D.C. Cir. rejected "mechanical hour-per-hour calculation" in favor of a qualitative standard on ground that compensatory awards should aim to place disabled children in the "same position they would have occupied but for the school district's violations;" compensatory education award "must be a qualitative, fact-intensive, and above all tailored to the unique needs of the disabled student."
 - Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 2005)(rejecting "cookie-cutter" award of tutoring for one hour per day student went without FAPE and instead remanding to craft an individualized award);
 - Branham v. Dist. of Columbia, 427 F.3d 7 (D.C. Cir. 2005) (rejecting unexplained lump sum of four years of tutoring for four years denial of FAPE and remanding to craft tailored award).

24

However: Current Trend in D.C. Circuit

- The flexible approach may properly result in a formula based or hour-for-hour award after all "if it represents an individually tailored approach to meet a student's unique prospective needs, as opposed to a backwards looking calculation of educational units denied to a student."
 - Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121 (D.D.C. 2008); Mary McCleod Bethune Day Charter Academy Pub. Charter Sch. V. Bland, 555 F. Supp. 2d 130 (D.D.C. 2008).

25

Other Judicial Reasoning Supporting Flexible Approach

- **Sixth Circuit:** "[F]lexible approach, rather than rote hour-by-hour compensation award is more likely to address [the student's] educational problems successfully." Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307 (6th Cir. 2007).
 - On remand, District Court remanded to State Appeals Bd. with instruction to craft comp. ed. award with:
 - no minimum hours;
 - with goal of compensating child for denial of FAPE for two years plus one summer; and
 - including the extent to which deficiencies created have been compounded by the dispute itself.
- **Ninth Circuit:** The courts have discretion as to how to craft the relief but there is no obligation to provide a day-for-day compensation for time missed. Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025 (9th Cir. 2006) (affirming comp. ed. award providing student's teachers with 30 min/wk of training so that they could better meet the student's particular needs).

26

Who Decides Parameters of Comp. Ed. Award?

- Court?
- Hearing Officer? Appeals Panel?
- Outside Expert?
- IEP Team?
- Parents?
- Mutual Agreement between parties (such as comp. ed. "fund")?

27

Other Avenues for Awarding Comp. Ed.: State Complaint Procedures

- State educational agency (SEA) must have complaint process; remedies must address:
 - "The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement)" 34 C.F.R. § 300.151(b)(2).
- The complaint must allege a violation that occurred not more than **one year** prior to the date that the complaint is received. 34 C.F.R. § 300.153(c).
- NOTE: State complaint process may be very useful for straightforward issues (e.g., FAPE denied because a service listed in IEP was never provided); in contrast, complex issues (e.g., whether specially designed instruction provided was inappropriate) require due process hearing.

28

Special Circumstances: Extension of Educational Services Beyond Age 21

- **Widely accepted that students may be awarded compensatory education to extend beyond IDEA eligibility (age 21) to compensate for past deprivation of an appropriate education when the student was eligible. E.g., Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Pihl v. Mass. Dept. Educ., 9 F.3d 184 (1st Cir. 1993).**

29

Special Circumstances: Class Action

- Compensatory education award granted in class action in which district court found that **systemic** "child find" violations resulted in denial of FAPE:
 - Court appointed independent monitor to head a "hybrid IEP Team" consisting of approved district personnel and rotating members with knowledge of unique needs of each class member.
 - Rather than apply an hour-for-hour award, the team responsible for determining whether each class member was entitled to comp. ed., and type and amount, determined award according to the needs of each unique child in order to place each student in the position they would have been in if FAPE had been provided.
 - See Jamie S., et al. v. Milwaukee Pub. Schs., 2009 WL 1615520, at *31-33 (E.D. Wisc. June 9, 2009).

30

Special Circumstances: Is Comp. Ed. Available for Eligible Young Children Under Part C?

- **Probably.** County did not appeal hearing officer's compensatory education award consisting of missed hours of speech & language therapy because agency failed to provide service in twins' "natural environment" in Andrew M. v. Del. County Office of Mental Health, 490 F.3d 337, 348 (3d Cir. 2007). See also Wagner v. Short, 63 F. Supp. 2d 672, 677 (D. Md. 1999) (noting that compensatory education is an available remedy for Part C violations but finding no violation in the case).

31

Special Circumstances: Is Comp. Ed. Available for Children Transitioning to Part B?

- **Possibly:**
 - See Shawn M. v. Hamamoto, 2009 WL 3415308 (D. Haw. Oct. 22, 2009) (remanded to Hearing Officer to determine if 3-year-old would benefit from compensatory education for failure to provide transition services specified in IEP).
 - But see Bucks County MH/MR v. de Mora, 379 F.3d 61, 72-73 (3d Cir. 2004) (awarding reimbursement to parent for time expended providing therapy services to her child, but noting that unlike comp. ed. awards beyond age 21, comp. ed. to "extend" service to toddlers beyond their eligibility is of "no benefit under Part C because disabled infants and toddlers become immediately eligible for Part B services upon reaching age three.") ?????

32

Two-year Statute of Limitations: Impact on Comp. Ed. Awards

- Parent must request a due process hearing within two (2) years of date that parent or LEA "knew or should have known" about alleged action that forms basis of complaint [unless State has explicit time limitation], except:
 - When the parent was prevented from requesting a due process hearing due to:
 - (i) specific misrepresentation by LEA that LEA had resolved the problem; OR
 - (ii) LEA withheld required information from parent.
- See 20 U.S.C. § 1415(f)(3)(C)-(D); 34 C.F.R. § 300.507(a)(2); 300.511(e)-(f)(1)-(2).

33

Does Statute of Limitations Limit How Far Back Comp. Ed. Award Can Go?

- No. As long as the 2 year statute of limitations is met, federal courts do not limit how far a comp. ed. award can go back
 - E.g., *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275 (11th Cir. 2008)
 - Compensatory education is triggered when "responsible authorities" fail to provide student with an "appropriate education" as required by the IDEA.
 - Comp. ed. award extended back five years (from time school district charged with knowledge) when parents requested due process hearing within two years of being informed of the results.
 - **HOWEVER**, beware - state courts may impose different time limit on how far back award can go. See, e.g., *Montour Sch. Dist. v. S.T.*, 805 A.2d 29 (Pa. Cmwlth. Ct. 2002).

34

Examples of How Compensatory Education Awards May Be Used

- Tutoring
- Therapy sessions
- Hours of specialized instruction
- Assistive Technology
- Summer programming in addition to ESY
- Afterschool program
- Camp or other non-educational setting (ex: to teach social skills)
- School district paid private placement or private services
- Training for student's teachers to better implement teaching to goals/needs
- Hiring specialist to consult on student's program
- Educational services to extend beyond eligibility (age 21) to make up for past deprivation of a FAPE

35

Strategic Considerations: Building Your Case

- **Remember: Comp. ed. award MUST be based on denial of FAPE**
- Key element of analyzing your case and determining strategy
- Effective tool in negotiation/settlement & is an important factor from the beginning as you lay out your case for counsel (pre-resolution, in resolution session & beyond.)
- Review file with an eye toward building your comp. ed. case
- Consider whether independent evaluation might support your comp. ed. claim AND provide significant guidance

36

Step I: Can You Establish Claim for Comp. Ed.?

- Yes:
 - Denial of FAPE is CLEAR based on undisputed straight-forward facts (*e.g.*, delayed enrollment, failure to evaluate/re-evaluate, placement of child in admittedly inappropriate setting such as partial hospitalization program).
 - Denial of FAPE is UNCLEAR and based on contested facts (*e.g.*, whether services or placement were inappropriate resulting in denial of FAPE).
- No:
 - IDEA violation was NOT material; minor discrepancy.
 - Procedural violation ≠ substantive deprivation of FAPE.

37

Step II: Assess The Value of Comp. Ed. Claim

- Calculate potential value of comp. ed. award by considering:
 - How long was child denied a FAPE?
 - Failure of district to identify child as needing services & impact on child's educational progress
 - Did any procedural violations result in substantive deprivation of FAPE?
 - What services, etc. DID child need to have a FAPE:
 - Child's placement needs
 - List all IEP services denied (*e.g.*, programs, services, ESY, transition plan, assistive technology)
 - Calculate hours/days of missed time
 - Special needs of child (*e.g.*, English language learner)
 - What DOES child need NOW to bring child to where she would have been had she received a FAPE? evaluations, programs, services, ESY, one-to-one tutoring, transition plan, technology, software, credit recovery, access to voc. tech., post-secondary

38

Step III: Litigation Strategy

- Major Focus of Due Process Request:
 - Duration of the FAPE deprivation
 - Extent of deficiencies/issues caused by denial of FAPE
 - Think BROADLY about scope of comp. ed. required
 - Apply legal standards & use case examples
- Consider how independent evaluation may provide insight into what student needs
- Make your case for comp. ed. BEFORE and DURING the resolution session
 - Be specific about the WHAT the child clearly needed.
 - Explain impact of denial of FAPE to the extent "currently" known and need for flexibility in crafting appropriate remedy
 - Describe SOME of the services needed to compensate the child for denial of FAPE in order to bring child to where she would have been if the District had provided FAPE.
 - Emphasize the maximum length of time at issue.

39

WARNING: SES ≠ Comp. Ed.

- Districts may offer “supplemental education services” in lieu of comp. ed.
- However – SES is NOT comp. ed.:
 - Supplemental educational services alone provided by a district which denied FAPE at their discretion is an ineffective remedy;
 - The same teachers who previously failed to educate the child could be responsible for remediating past failures.
 - Does not provide the range of services and options and hours available through a comp. ed. fund.

40

Step IV: The Due Process Hearing

- **Components of establishing claim at the Due Process Hearing:**
 - **Direct testimony:** Parent’s expectations, services/placement requested and not received; failure to progress, etc.
 - **Expert witnesses:** Establish claim through independent evaluator, doctors, others; specific testimony addressing what was needed and for how long.
 - **School District testimony:** IEPs, progress notes, grades, school psychologist evaluation: references to lack of educational benefit, specific unmet benchmarks, indications of what was needed.
 - **Cross-examine:** Focus on undisputed accounts of failure to make progress over time and needed services.
 - **Opening & Closing:** Emphasize need for prospective relief and the immovable factors of time – What does the child need NOW to make up for denial of FAPE? How much is needed? For how long?

41

Step V: Negotiation Strategy

- **Revise current IEP first:** Include all components that student needs NOW to make progress under IDEA (*e.g.*, remedial help, one-on-one tutoring, smaller groups, ESY, transportation, accommodations)
- **THEN address need for compensatory education services as “make up” services:** consider services, technology etc. that child will need to compensate for denial of a FAPE
 - Services, tutoring – frequency & duration
 - Computer, books, software
 - Counseling
 - Access to credit recovery programs & support
 - Post-secondary schooling
 - Assistive Technology

42

Step VI: The Settlement Agreement - Crafting An Effective Comp. Ed. Award

□ **Decisions, decisions:**

- "Comp. ed. fund" or "service hours"
- Administered by School District, The Arc or other – Pros & Cons: Ensure fund WILL be used:
 - Easy access to funds/relationship of parties
 - Prompt access: type of services/from where
 - Expenses of third party administered fund
- ALWAYS: Consider whether time for using comp ed award should be extended?
- What happens to remainder of money at age 21 or other or "per school year"?

43

Tip 1: Crafting An Effective Provision Ensure Broad Use of Comp. Ed. Funds

□ **BE CLEAR re use of comp. ed. fund to meet the changing needs of student over time:**

- *"Fund shall be used for educational expenses which shall include but not be limited to: educational instruction, including academic, vocational, and art instruction; any tuition, room and board or other fees associated with enrollment or receipt of educational services, including transportation and special education support services; computer and other assistive technology, including educational software, support services and other assistive technology services; educational materials, including books and art supplies; professional skills training; and transition coordination services, including job training, employment and employment support services"*

44

Tip 2: Ensure PROMPT Access to Fund

□ **Identify point of contact** to establish direct invoicing between the family and the district.
□ **Impose specific timelines** on school district for responding to requests for disbursements:

- *The District shall pay invoices, statements or bills for proposed services and expenses directly to a chosen provider or the family within two weeks of receiving such invoices, bills or statements.*
- *Any delay in approval of services or payment for services by the DISTRICT beyond the two week period so that services are delayed or interrupted shall result in an extension of time for use of the compensatory education fund equal to the period of delay or interruption.*

45

Tip 3: Ensure USE of ALL funds

- **Scope of use:** *These funds shall be available to the student notwithstanding whether she has graduated from the District, whether she continues to attend the District and/or another school or institution of higher education or is over the age of twenty-one (21).*
- **Advise your client** of opportunities & resources
- **Know your account and PLAN:**
 - *The Family shall receive quarterly reports documenting all disbursements and indicating any and all remaining compensatory education funds available.*
 - *Counsel shall receive copies of all quarterly reports provided to the Family.*

46

Tip 4: Anticipate Common Problems

- **Comp. ed. is provided in addition to current IEP services:** *The hours shall be used to supplement, rather than supplant, services, and programming, available under public programs, including the Student's current and future IEP and ESY entitlements.*
- **Clarify calculation of hourly rates:** *In the event the actual cost of a compensatory education hour exceeds \$60.00, the District shall receive credit toward Student's entitlement to 2000 hours of compensatory education on a proportional basis.*
- **Address Teacher Qualification Issues**

47

Tip 5: Improve the Relationship

- Family and district WILL continue to deal with each other over time
- **Anticipate problems:** Comp. ed. provisions should be specific and address common issues:
 - How fund can be used, accessed etc.
 - Timing of disbursements & invoices
 - Level of specificity of requests
 - Avoid characterizing/narrowing use of funds (*e.g.*, "reasonable" expenses or transportation costs)
 - Address how disputes over use of funds or delays in accessing funds will be addressed

48

Education Law Center-PA
www.elc-pa.org

□ **Philadelphia Office:**
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
Phone: 215 238 070

□ **Pittsburgh Office:**
702 Law & Finance Building
429 Fourth Ave.
Pittsburgh, PA 15219
Phone: 412 38 2120



49

Education Law Center Resources

Manuals

- *NEW! The Right to Special Education In Pennsylvania: A Guide for Parents and Advocates (2009 edition)*
- *The Right to Early Intervention for Infants and Toddlers and Their Families in Pennsylvania: A Handbook for Parents (2008 edition)*

New Report!

- *Costing Out the Resources Needed to Meet Pennsylvania's Education Goals for Students with Disabilities*

50



Contact Information

Jennifer Lowman, Esq.
Director of Client Services &
Training
jlowman@elc-pa.org

Maura McInerney, Esq.
Education Law Center
mmcinerney@elc-pa.org

51
