

## Compensatory Educational Services in Light of COVID-19 School Closure Questions and Answers

### Introduction

During the period of school closure related to COVID-19, emergency remote learning is being provided to all students as outlined in HB2910 and the Governor's executive orders. Per both state and federal guidance and the implementing regulations, public educational agencies (PEAs) are required to provide both equitable access to general education opportunities **and** to continue to provide a free and appropriate education (FAPE) to students with disabilities to the maximum extent possible. Many students will receive a FAPE during this period of closure; however, it is acknowledged, that despite best intentions, efforts, and creative solutions, there are some students who will not receive a FAPE over the course of the school closure. Therefore, PEAs will need to make an individual determination, for each student, as to whether compensatory educational services will be necessary due to the failure or the inability of the PEA to provide a FAPE.

Compensatory educational services are not expressly defined in the IDEA; however, courts [under the authority granted them in 20 U.S.C. § 1415(i)(2)(C)(iii) and 34 C.F.R. § 300.516(c)(3)] have long awarded compensatory educational services as an appropriate remedy under the IDEA when a student has been denied a FAPE. In the present circumstances, the purpose of compensatory educational services is to remedy the PEAs inability to provide a child with a disability with appropriate services during the time that the child is (or was) entitled to a free appropriate public education. See for example [Letter to Lipsett](#) outlining the purpose of a compensatory educational services award.

Compensatory educational services are not a contractual remedy, but an equitable remedy. It is designed to ensure the student is appropriately educated within the meaning of the IDEA and as such "[t]here is no obligation to provide day-for-day or minute for minute compensation for time missed." [See Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1496-97 \(9<sup>th</sup> Cir.1994\)](#). Compensatory educational services should be determined by looking at the totality of the circumstances for each student and determining the amount of service needed to remedy the educational deficits resulting from a failure to provide a FAPE. Because compensatory educational services are an equitable remedy, parental input is important and parent information and concerns should be considered in determining whether or not compensatory educational services are owed, how much service time is needed, and how the services will be delivered. Schools have flexibility and can be creative in fashioning compensatory education awards. See *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011) (Courts have been "creative in fashioning the amount and type of compensatory education services to award").

The Arizona Department of Education offers the following guidance to assist PEAs in fulfilling their obligation to provide a FAPE to students with disabilities. However, due to the nature of a pandemic and the unprecedented circumstances of this interruption to the typical operations of brick and mortar schools, this guidance cannot provide an answer to every circumstance that may arise once students return to public school campuses. This guidance also does not substitute for legal advice and PEAs are always encouraged to consult with their legal counsel when deciding how to proceed in a specific factual scenario.

### Questions and Answers

**If a public education agency (PEA) provided some services during the school closure, or only enrichment opportunities, must it assess the needs of individual students for compensatory education?**

Yes. During the period of school closure related to COVID-19, emergency remote learning is being provided to all students as outlined in HB2910 and the Governor's executive orders. Per state and federal guidance and implementing regulations, PEAs are required to provide equitable access to general education opportunities **and** continue to provide a free and appropriate education (FAPE) to students with disabilities

to the maximum extent possible. It is acknowledged, that despite best intentions, efforts and creative solutions, there are some students who will not receive a FAPE over the course of the school closure. Therefore, PEAs will need to make individual determinations, for each student, as to whether compensatory educational services will be owed due to the PEAs failure or inability to provide a FAPE.

### **Why must compensatory educational services be considered if the PEA provided some educational opportunities to students with disabilities?**

Compensatory educational services are not expressly defined in the IDEA; however, courts [under the authority granted them in 20 U.S.C. § 1415(i)(2)(C)(iii) and 34 C.F.R. § 300.516(c)(3)] have long awarded compensatory educational services as an appropriate remedy under the IDEA when a student has been denied a FAPE. In the present circumstances, the purpose of compensatory services is to remedy the PEA's failure or inability to provide a child with a disability with appropriate services during the time that the child is (or was) entitled to a free appropriate public education.

### **Does a PEA have to provide the same amount (minute for minute) of service time missed from the IEP as compensatory educational services?**

No. Compensatory educational services are not a contractual remedy, but an **equitable** remedy. It is designed to ensure that the student is appropriately educated within the meaning of the IDEA and as such "[t]here is no obligation to provide day-for-day or minute for minute compensation for time missed." [See \*Parents of Student W. v. Puyallup Sch. Dist.\*, 31 F.3d 1489, 1496-97 \(9<sup>th</sup> Cir.1994\)](#). Compensatory educational services should be determined by looking at the totality of the circumstances for each student and determining the amount of service needed to remedy the educational deficits resulting from a failure to provide a FAPE.

### **How should a PEA determine whether a student with a disability should receive compensatory education services?**

Compensatory educational services should be determined by looking at the totality of the circumstances for each student, including parental input, and determining the amount of service, if any, needed to remedy the educational deficits resulting from a failure or inability to provide a FAPE. A formal IEP meeting is **not** required to make a determination of the need for, the amount or delivery of compensatory educational services. However, in looking at the totality of the circumstances, parental input should be solicited and considered. It is then incumbent upon the PEA to make an offer of compensatory educational services when the determination has been made that an individual student was not provided with, or the PEA was unable to provide services during the period of school closure that would constitute a FAPE for that student.

In determining whether a FAPE was provided during the time of school closure, the best source of data may be 4<sup>th</sup> quarter progress reports as this data is most likely to capture student performance during the closure itself. If 4<sup>th</sup> quarter progress reporting is not available, nothing in this guidance would prohibit a PEA from collecting data to assess the need for compensatory educational services during the summer break if it was safe and feasible to do so. In any event, it is recommended that PEAs collect data and solicit parental input no later than 30 school days of students returning to the school campus, to determine the need for compensatory services.

In making an individualized determination as to whether a student is owed compensatory educational services, schools should consider a variety of factors, including **but not limited to**; services provided during the period of school closure, ability of the student to access any services provided during the period of school closure, regression in skills, progress or lack of progress made on IEP goals, and parental input.

### **How should a PEA determine the amount of compensatory educational service time that is needed?**

In making an individualized determination as to whether a student is owed compensatory educational services, schools should consider a variety of factors, including **but not limited to**; services provided during

the period of school closure, ability of the student to access any services provided during the period of school closure, regression in skills, progress or lack of progress made on IEP goals, and parental input.

Compensatory educational services should be offered that will allow the student to continue to make progress in the general education setting, or to progress at an appropriate pace in light of the child's circumstances, once students may safely return to the school campus.

**Must parents be involved in the determination of compensatory educational service provision?**

Yes. PEAs should solicit and consider parental input to determine whether compensatory educational services are needed and if necessary, how those services will be delivered.

**Can a PEA offer all students summer school as compensatory educational services?**

No. PEAs must ensure that **individualized** determinations are made related to the extent to which a student may require compensatory services. Schools should not create blanket rules offering a set amount of compensatory services to all students, or to subsets of students with disabilities, when they return to school campuses. In order to provide a FAPE, schools have an obligation to consider compensatory education for each student with a disability without the need for parents or guardians to file a state administrative complaint or a due process request for hearing.

**Must all students with disabilities be provided with compensatory educational services?**

No. PEAs must ensure that **individualized** determinations are made related to the extent to which a student may require compensatory educational services. In the present circumstances the purpose of compensatory educational services is to remedy the PEA's failure or inability to provide a student with a disability a FAPE during the time that the child is (or was) entitled to a FAPE.

**If a parent refused the IEP services provided by the PEA in an alternative format during the period of school closure, must the PEA determine whether the student should receive compensatory educational services when the student did not participate or attend the services available?**

PEAs are advised to document all efforts to provide a FAPE to students during the period of school closure as well as document parent and student contact and communication. Please consult your legal counsel for the best way to proceed in this specific circumstance.

**Can parents refuse compensatory services?**

Yes, parents can refuse an offer of compensatory educational services. It is recommended that PEAs document parental input in the determination of the need for compensatory educational services and the proposed plan to provide the services, as well as the parent's refusal of the services offered. Prior written notice may be sent to document an offer of compensatory educational services and the parent's refusal. If a parent refuses the offer, the PEA has met its obligation by making the compensatory educational services available.

**If a parent refuses an offer of compensatory educational services, does the PEA have any further obligation?**

Once the PEA has made the offer of individualized compensatory educational services, the parent should make the student available to receive the services offered. If a parent refuses the offer, the PEA has met its obligation by making the compensatory educational services available. It is recommended that PEAs document parental input in the determination of the need for compensatory educational services and the proposed plan to provide the services as well as the parent's refusal. This may be done through a prior written notice.

**Can the service minutes provided in the current IEP be reduced, if compensatory educational services are offered, to account for additional service time provided as compensatory educational services?**

No. Compensatory educational services cannot interfere with the services the student is to receive under a current IEP. Compensatory services must be provided **in addition** to the services implemented in a current IEP. The delivery of the compensatory educational services cannot change the student's least restrictive environment.

**Must an IEP meeting be held once school resumes if a student's needs have changed as the result of the school closure?**

If a student's educational, social/emotional or behavioral needs have changed to the degree that the student's ongoing services or supports are no longer sufficient to provide a FAPE, the student's IEP team should meet to determine if the current IEP requires revision to reflect the student's current needs. (i.e. a student who did not have behaviors that impeded learning when school closed has now developed behaviors that impede his progress or a child has become markedly more anxious or depressed or has lost core academic skills previously learned). This is not the same as, or a substitute for, compensatory educational services nor will it be necessary in all cases.

**When can compensatory educational services be provided?**

Compensatory educational services may be provided during the regular school day, over school breaks, in intensive targeted, individualized programs, or by outside service providers. If compensatory educational services are to be provided during the school day, the student's least restrictive environment cannot be altered due to the provision of the compensatory educational services. Because the provision of compensatory educational services is an equitable remedy, PEAs are encouraged to be creative in designing a plan to deliver compensatory educational services that meets the needs of the individual student in remedying the failure or inability of the PEA to provide a FAPE.

**Must an IEP meeting be held to determine the need for compensatory educational services?**

No. IEP teams do not have to meet to determine if a student requires compensatory services, however parental input should be solicited and considered when determining the need for compensatory educational services and how the compensatory educational services will be provided.

**Can a PEA provide ESY to all students instead of offering compensatory educational services?**

No. Compensatory services should not be confused with extended school year services (ESY). ESY is designed to maintain skills over school breaks and prevent degradation of skills that will not be recouped within a reasonable time once school has resumed. The determination of the need for ESY services is a separate determination made in a student's IEP meeting.

Compensatory educational services are delivered when the PEA has failed or was unable to provide a FAPE to a student. In the current circumstance the failure or inability to provide a FAPE was due to school closure related to the COVID-19 pandemic.

**What happens if a PEA does not have the time, forgets, or fails for any reason, to make individualized determinations of the need for compensatory educational services to the students it serves?**

Parents retain their procedural safeguards and may file a state administrative complaint or file for a request for a due process hearing if their child is denied a free and appropriate public education, including the failure or inability of the PEA to provide a FAPE to the student during the time of an extended closure. However,

it is not advised that PEAs wait until a parent submits a state administrative complaint or files a request for a due process hearing as this may further delay the provision of a FAPE and result in the need for additional compensatory educational services.

**What happens if a parent disagrees with the PEA's offer of compensatory educational services?**

Parents retain their procedural safeguards in the event their child has been denied a FAPE. Parental rights under the IDEA have not been waived. Additionally, it is recommended that an alternative dispute resolution process such as mediation be used to resolve disagreements related to the need for compensatory educational services or the amount of compensatory educational services offered.

**What obligation does a PEA have to a student who was enrolled during school closure but has since withdrawn from school?**

The provision of compensatory educational services is an equitable remedy that is appropriate when a PEA either failed or was unable to provide an enrolled student with a disability a FAPE. It would fall to the PEA in which the student was enrolled at the time of the failure or inability to provide a FAPE to make a determination as to whether or not compensatory educational services need to be provided to the student and to deliver those services as appropriate.

**What obligation does the PEA have to a student with a disability who was enrolled at the time of the school closure but graduated or "aged out" before students return to campus for the 2020/2021 school year.**

The provision of compensatory educational services is an equitable remedy that is appropriate when a PEA either failed or was unable to provide an enrolled student with a disability a FAPE. It would fall to the PEA in which the student was enrolled at the time of the failure or inability to provide a FAPE to make a determination as to whether or not compensatory educational services need to be provided to the student and to deliver those services as appropriate. School districts have flexibility and can be creative in fashioning compensatory educational services offers and the unique needs of the student should be considered. However, please consult with your legal counsel for advice related to specific factual circumstances.

**If a parent refused services that were provided during the period of school closure, must the PEA make a determination as to the need for compensatory educational services or make an offer of compensatory educational services?**

It is strongly recommended that PEAs document attempts to provide services that were accessible to the students, through alternative or virtual formats, and to record contact and communications with parents and students. Because the compensatory educational services framework is founded on the failure or inability of the PEA to provide a FAPE, a parent's refusal of services may excuse the PEA of its obligation to consider compensatory educational services. However, please consult with your legal counsel for advice related to specific factual circumstances.