

2021

Schools Still Struggle with Compensatory Education Despite Coming Back to the Classroom

Alexa Valenzisi

Loyola University Chicago School of Law

Follow this and additional works at: <https://lawcommons.luc.edu/clrj>



Part of the [Family Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Alexa Valenzisi, *Schools Still Struggle with Compensatory Education Despite Coming Back to the Classroom*, 42 CHILD. LEGAL RTS. J. 66 ().

Available at: <https://lawcommons.luc.edu/clrj/vol42/iss1/6>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Children's Legal Rights Journal by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

Education Connection:
**Schools Still Struggle with Compensatory Education Despite
Coming Back to the Classroom**

*Alexa Valenzisi*¹

I. INTRODUCTION

Compensatory education is a common remedy among school districts to make sure children with disabilities are provided with their constitutional right to an appropriate education. Compensatory education provides students with disabilities additional programs or services so that child can receive their constitutional right to an appropriate education. These services can range from extended school years to providing a student with behavioral therapy. As schools wrestle with the myriad of challenges coming back to the classroom after the COVID-19 pandemic forced students to participate in online learning, compensatory services render themselves necessary in ways schools have not previously encountered. Autistic students, particularly, have faced social, emotional, and educational regressions, and schools must provide compensatory services as these students return to school to meet the goals laid out in their individualized education programs (IEPs). Though the COVID-19 pandemic has changed how schools provide compensatory education services, there are still compensatory education challenges schools face as autistic students re-enter the classroom.

II. EDUCATION LAW BACKGROUND

Section 504 of the Rehabilitation Act of 1973 protects the rights of individuals with disabilities within programs that receive federal funding. In this regulation, the government requires schools to provide students with disabilities a free appropriate public education (FAPE). A FAPE differs from student to student. Although each student comes with their own unique disability, state and federal legislation have tried to create a baseline for schools to follow to make sure each student does receive a FAPE in the least restrictive environment (LRE). Sometimes, however, students do not receive a FAPE for various reasons. These reasons can range from an inefficient and ineffective IEP to a global pandemic.

When students do not receive a FAPE, compensatory education - which is defined as an additional program or service to help students achieve a FAPE - is an equitable remedy that schools can employ either at their own discretion, or after a hearing officer mandates the school to provide it to a student. Courts have repeatedly upheld the constitutionality of compensatory education as a remedy for a lack of a FAPE.

¹ Alexa is a second-year law student pursuing a Juris Doctorate at Loyola University Chicago School of Law. She hopes to pursue a career in Education law.

As a result of the COVID-19 pandemic, the U.S. Department of Education provided schools with general guidelines that laid out ways to rectify the lost in-person education time through compensatory education services. It is important to note that compensatory education is not a substitution, but rather a supplement, to provide students with a FAPE.

III. AUTISM SPECTRUM DISORDER AND CHALLENGES WITH THE COVID-19 PANDEMIC

A. Defining Autism Spectrum Disorder

According to the American Psychiatric Association (APA), autism spectrum disorder, also known as “autism” or “ASD”, is defined as “a complex developmental condition involving persistent challenges with social communication, restricted interests, and repetitive behavior.” Common IEPs for students with autism address social and behavioral skills, as well as educational concerns. One of the most beneficial elements of school for autistic students is interacting with typically developing students and learning certain social behaviors and etiquettes.

B. Concerns During Remote Learning

During remote learning due to COVID-19, parents were concerned about their autistic children’s social, emotional, and academic development. One of the major issues for students with autism surrounding COVID-19 was the lack of social opportunities to better their socialization skills. When schools were completely virtual, there was no option for any students with disabilities to practice any socialization skills with their peers. Schools were entitled to provide special education services through a set plan for students with IEPs during online learning. These plans focused heavily on equal access to technology and other support tools. Even with plans in place, not every child with a disability who needed a FAPE received one through online learning.

Children with autism require compensatory services that address both social and emotional needs during remote learning. Some common concerns regarding compensatory education included, but were not limited to, lack of internet access, no opportunity for their child to socialize with typically developing students, or a lack of services that the student’s IEP deemed necessary to achieve a FAPE. Before the pandemic, schools often received compensatory education requests, but the online learning environment raised new concerns that led parents to believe their child was not receiving a FAPE. Schools had to figure out new solutions to these new concerns quickly as online learning became the “new normal.”

It is important to note that during COVID-19, students were entitled to services “as appropriate.” This delineation between an “appropriate” education and “the best” education for students with disabilities has always been a point of contention between parents and school districts – as the law only demands an appropriate education – but courts did not veer from this distinction during COVID-19. Still, there were clear cases

where the IEP goals were not met, and therefore, the child was entitled to compensatory services.

C. The Process to Determine Who Receives Compensatory Education Services

The best way for a parent to ensure their autistic child receives compensatory education, specifically because of an online learning environment, is to show, through data, that the child regressed in their skills. Again, because each student is different, each regression would look different, and schools analyze them on a case-by-case basis. The most common method to demonstrate a child's need for a compensatory education service would be to look at the child's IEP and see what goals the IEP team laid out for them. Then, the parent would need to track their child's progress throughout the virtual learning period through charts, videos, or diaries. Once the data was compiled, the parent would have to show the school that at the beginning of COVID-19, their child exceeded in a certain number of skills at a certain level. The parent would then have to show that there was a regression in those skills, specifically that the child was not achieving as many goals at the rate they were before school went online. It is the parent's burden to prove to the hearing officer that their child is entitled to compensatory education services because the school did not provide their child with a FAPE. If a parent were to successfully prove this, the child is eligible to receive compensatory education services.

The school, likewise, predominately evaluates the child's level of academic performance when determining who is entitled to compensatory education. If the performance level was below what it was before school closures and online learning began, the IEP team will need to provide more services to the child to make up for the lost time and educational benefits the child missed out on. A child can be eligible for compensatory education for other reasons as well, such as a delayed IEP implementation, or if the hybrid or online services do not meet the child's needs.

Schools will award compensatory education in either a quantitative or qualitative manner. The quantitative approach provides the student an hour-for-hour replacement of learning for the educational time lost. The qualitative approach, which courts tend to administer more often, focuses less on the time lost, and rather addresses the educational experience and benefits the child did not receive. The Department of Education lays out foundation for schools to adhere to compensatory education regulations. One of the most common methods is through an extended school year (ESY). ESY provides additional schooling outside normal school hours, usually during the summer. But because of COVID-19, the ESY was online, so schools had to think outside the box to provide students with a FAPE, specifically addressing social and behavioral skills. Schools attempted this in multiple ways, such as paying for behavioral therapy services and tutoring during online learning.

D. Concerns During In-Person and Hybrid Learning

As schools begin to go back to in-person learning, compensatory education still needs to be addressed, especially as it relates to autistic students. These students will still

struggle with socialization and certain behavioral changes as the new interface of in-person classrooms and learning environments come back. The adjustment to going back to in-person class is difficult for all students, and students with autism are absolutely no exception to this rule. Not only have students with autism lost certain levels of academic performance, but they may not understand the social implications of coming back to in-person classes. For example, students with autism may not be able to pick up on social cues in the classroom because of the mask mandates that require their teachers and peers to wear masks. Without the entire face to see facial expressions, students with autism are still losing valuable social skills that the classroom previously provided them. Moreover, students with autism may not be able to understand the need for social distancing and might require more sensory stimulation than what a socially distanced class can provide them with.

Compensatory education should not be neglected simply because students are back in the classroom. The need for compensatory education does not go away when students, specifically those with autism, are in person. Schools also need to acknowledge that students with autism still face a barrier when learning how to socialize, and parents should persist in their claims that their child is entitled to compensatory education services.

IV. RECOMMENDATIONS TO IMPROVE COMPENSATORY EDUCATION

Across the country, special education teams need to reinvent how they implement compensatory education services. There is no question that schools are run thin with resources and financial means to provide each student compensatory education. But despite being in unprecedented times, schools still must provide students with disabilities a FAPE. Schools are provided with financial resources, such as grants, to give students proper compensatory education services. However, schools will need to be more savvy than usual when conducting remedies to adhere to compensatory education regulations, as COVID-19 caused remedial measures for the lack of in-person learning in a way school districts had never experienced before. The Individuals with Disabilities Education Act (IDEA) has laid out certain ways for schools to ensure appropriate compensatory education services are provided to students, but these regulations are purposely vague, as each child requires their own unique IEP and goals. IDEA articulates that the IEP teams should focus on the delivery, timing, and frequency of the compensatory services.

As stated previously, courts typically lean more towards qualitative approaches to provide students with compensatory education. This qualitative approach - which focuses less on the educational time lost, but rather the experience and skills lost - should continue to be the trend, especially after COVID-19. Schools are overwhelmed with the number of students who are entitled to compensatory education and the amount of time lost in the classroom to the point where a quantitative approach would be nearly impossible to achieve. The qualitative approach allows school districts to use different methods to provide students with compensatory education. Notably, compensatory education services can be provided not only by the school, but also by private providers

any time before or after school, weekends, or during school breaks. This allows for the school to broaden their options for how to remediate the lack of a FAPE. For example, schools have previously employed this by paying for behavioral therapists or tutors to come and supplement lost educational time.

Schools need to look at other ways to outsource compensatory education services to take some of the burden off the teachers and staff within the district. While providing an extended school year is still an effective way to provide autistic students with compensatory education, the school might lack the resources to do so for every child that requires it. Instead, schools may want to send their students to camps, museums, or other places that will teach them skills they regressed in during online learning. For example, if a child with autism is experiencing a regression in behavioral skills, sending them to an aquarium, or field trips like an aquarium trip with their peers on the weekend would be a great opportunity for them to socialize with students outside the classroom. Moreover, the aquarium could have some interactive activities, which would allow the student to practice their social skills, and stimulate their sensory needs, as there can be a “pet the animal” exhibit that a child with autism would benefit from.

The qualitative approach, especially when the world opens up again, allows schools to maximize the time and way in which they can provide students with unique ways to receive compensatory education. The qualitative approach to compensatory education, considering how much time and the way in which students regressed, is the most probable and beneficial method to provide students with compensatory education.

V. CONCLUSION

Compensatory education has been a controversial issue in the special education sphere long before March 13, 2020. However, COVID-19 has expedited not only the concern, but also the need, for compensatory education across the entire country. The need for compensatory education, specifically for students with autism, was clear during virtual learning. Although students are returning to in-person learning, there are still obstacles that schools need to address and rectify.

School districts must be diligent when providing compensatory education to students and should not neglect the need for it even as students return to the classroom. Additionally, schools should focus on a qualitative approach to compensatory education and may need to go beyond ESY and other ordinary remedies to provide students a FAPE.

SOURCES

Compensatory Education, Merriam-Webster, <https://www.merriam-webster.com/dictionary/compensatory%20education> (last visited Dec. 19, 2021).

COUNCIL OF PARENT ATT'YS & ADVOCS., FAQ ON COMPENSATORY EDUCATION IN THE TIME OF COVID-19 (2020), <https://www.wrightslaw.com/covid/2020.0813.COPAA.CompEd.FAQ.pdf>.

DISABILITY RTS. OHIO, COMPENSATORY EDUCATION AND ESY DISCUSSION AFTER COVID-19: FACT SHEET, <https://www.disabilityrightsohio.org/assets/documents/compensatory-educationesy-covid-19-fact-sheet.pdf>.

Hillary D. Freeman, *Compensatory Services in the Age of COVID*, AUTISM SPECTRUM NEWS (Jan. 1, 2021), <https://autismspectrumnews.org/compensatory-services-in-the-age-of-covid/>.

Corey Mitchell, *How Will Schools Pay for Compensatory Services for Special Ed. Students?*, EDUC. WK. (Nov. 10, 2020), <https://www.edweek.org/teaching-learning/how-will-schools-pay-for-compensatory-services-for-special-ed-students/2020/11>.

M.W. ex rel. S.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131 (2d Cir. 2013).

Cara Nissman, *Social Distancing, Wearing Masks: Help Students with Autism Follow Rules*, DIST. ADMIN. (Aug. 28, 2020), <https://districtadministration.com/social-distancing-wearing-masks-help-students-with-autism-follow-rules/>.

OFF. OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., OSEP QA 21-06, RETURN TO SCHOOL ROADMAP: DEVELOPMENT AND IMPLEMENTATION OF INDIVIDUALIZED EDUCATION PROGRAMS IN THE LEAST RESTRICTIVE ENVIRONMENT UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2021), <https://sites.ed.gov/idea/files/rts-iep-09-30-2021.pdf>.

Rehabilitation Act of 1973, 29 U.S.C. § 794 (2016).

LINDA SWEET MARKS ET AL., EDUC. L. CTR., COVID-19 AND STUDENTS WITH DISABILITIES: FREQUENTLY ASKED QUESTIONS (FAQ) (2020), https://edlawcenter.org/assets/files/pdfs/publications/COVID_19_and_SWD_FAQ_2nd_Edition.pdf.

Tips to Help Kids with Autism Transition Back to In-Person School, U.C. DAVIS HEALTH (Aug. 17, 2021), <https://health.ucdavis.edu/health-news/newsroom/tips-to-help-kids-with-autism-transition-back-to-in-person-school/2021/08>.

U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK (2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

What is Autism Spectrum Disorder?, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/autism/what-is-autism-spectrum-disorder> (last visited Dec. 19, 2021).