




COMPENSATORY EDUCATION AND THE PANDEMIC: RIGHTS AND CONSIDERATIONS


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FOCUS OF SESSION

- What is compensatory education?
 - How and when can compensatory education be provided?
 - How to prepare for the IEP meeting to discuss your child's need for compensatory education.
 - If no agreement reached, by what date must you file for due process?
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Rights of Students Placed By Their Public School in a Private School

- When a student is placed in an approved private school by their school district, the private school and the sending school district must both ensure that special education and related services are provided in accordance with student's IEP.
 - N.J.A.C. 6A:14-7.5(a); N.J.A.C. 6A:14-7.6.
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WHAT IS COMPENSATORY EDUCATION?

- Compensatory Education is:
 - an equitable remedy created by courts
 - that entitles students with disabilities to receive additional educational services
 - To make up for for past violations.
 - A student is not required to show regression in order to receive compensatory education.
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AIM OF COMPENSATORY EDUCATION

- Compensatory Education:
 - “aim[s] to place disabled children in the same position they would have occupied
 - by providing the educational services the children should have received in the first instance.”
 - *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015);



PROBLEMS THAT MAY ENTITLE STUDENTS TO COMPENSATORY EDUCATION DURING COVID-19

- Technology or internet problems;
 - Paper packets or posted assignments;
 - Student's IEP not fully implemented;
 - Virtual instruction offered during COVID not individualized and appropriate for student;
 - Other problems.
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TECHNOLOGY PROBLEMS INCLUDE:

- Did not have computer or device needed to access instruction.
- Had only one device and had to share with other children
- No internet connection or poor connection.
- Experienced problems accessing virtual instruction and unable to obtain assistance from district in resolving issues.
- Augmentative communication device not available.



PAPER PACKET/ACTIVITY SHEETS/POSTED ASSIGNMENTS

- Only given paper packets, activity sheets or posted assignments.
- Paper packets/activity sheets were not in student and/or parent's native language.
- Student could not read at all or not at the level required by packets/activity sheets.
- Were only a review of prior learning.
- Minimal (or no) direct contact with teacher or related service provider.
- Other.



FAILURE TO FULLY IMPLEMENT IEP

- IDEA defines FAPE to include:
 - Special education and related services that are provided in conformity with the student's IEP.
 - Means failure to implement IEP = No FAPE!
- 20 U.S.C. § 1401(9); 34 C.F.R. 300.101 to 300.113; N.J.A.C. 6A:14-1.1(d).



DISTRICTS REQUIRED TO FULLY IMPLEMENT IEPs DURING COVID-19

- Must fully implement IEPs in order to provide the student with a FAPE. N.J.A.C. 6A:14-4.1(a).
- US ED and NJDOE have not granted school districts an exemption from state regulations governing the delivery of special education and related services during COVID-19.
- Fact student is attending a remote setting doesn't relieve the district of its responsibility to provide services as described in the student's IEP.
- **Note:** Taken from conclusions reached by NJDOE in State Complaint Reports during COVID-19.



IEP NOT FULLY IMPLEMENTED

Examples

- **Related services** [specify which ones] were not provided at all or not provided for the required amount;
- **Paraprofessional** (aide) for [subjects and amount of time] was not provided at all or not for the required amount;
- **In-class support** by special education teacher in [specify subject] not provided at all or for the required amount.



IEP NOT FULLY IMPLEMENTED

Examples (cont.)

- **Accommodations and modifications** in IEP not provided [specify each not provided that you believe impacted student's education]
- **Community based instruction** *in the community* not provided.
- **Job exploration, sampling and/or job training** *in the community* not provided.
- **Remote option** district would not provide same services as it provided to students attending in-person. [specify what would not provide].



IEP NOT FULLY IMPLEMENTED

Examples (cont.)

- **Asynchronous or recorded instruction** by general education teacher which meant that student with disabilities could not simultaneously receive in-class support by special education teacher for [name subjects] or receive support by para.
- **Not in LRE** was to attend general education classes with non-disabled peers for [list subjects] but general education students not in school.



DOES ANY DEVIATION FROM IEP ENTITLE STUDENT TO COMPENSATORY EDUCATION?

- *De minimis* (minor) differences may not warrant compensatory education.

➤ Examples

- IEP says 30 minutes speech therapy per week but during school closures, reduced to 25 minutes a week—may be considered *de minimis*.
- Aide with specialized training in ABA unexpectedly quits and district offers aide without specialized training for ten days it takes to locate and train new aide.



DETERMINING AMOUNT OF COMPENSATORY EDUCATION

- ▶ The courts in New Jersey use a quantitative or 1:1 approach to decide how much compensatory education the student is entitled to — in other words:
 - ▶ minute by minute;
 - ▶ hour for hour; or
 - ▶ day for day to make up for the time period the student's IEP was not fully implemented or virtual instruction was not appropriate for the student.



EXAMPLES USING 1:1 APPROACH (cont.)


- 20 hours of speech language therapy for the 20 hours in IEP that were not provided.
- 17 days of compensatory education when no schooling provided for 17 days.
- Where student received one hour of academic instruction per day but no related services, court found that the lack of IEP services **pervaded** the entire day, entitling student to one day of compensatory education for each day their IEP was not fully implemented.



EXAMPLES USING 1:1 APPROACH (cont.)

Paper packets/ Posted Assignments

- Student confined to correctional institution entitled to full days of compensatory education for each school day he received only paper packets and occasional contact with an instructor.
- “[W]ork packets...with no scheduled interaction with any teacher, do not constitute specialized instruction or virtual instruction.”
- Student entitled to nine 30-minute sessions of speech when received only posted assignments for nine sessions.

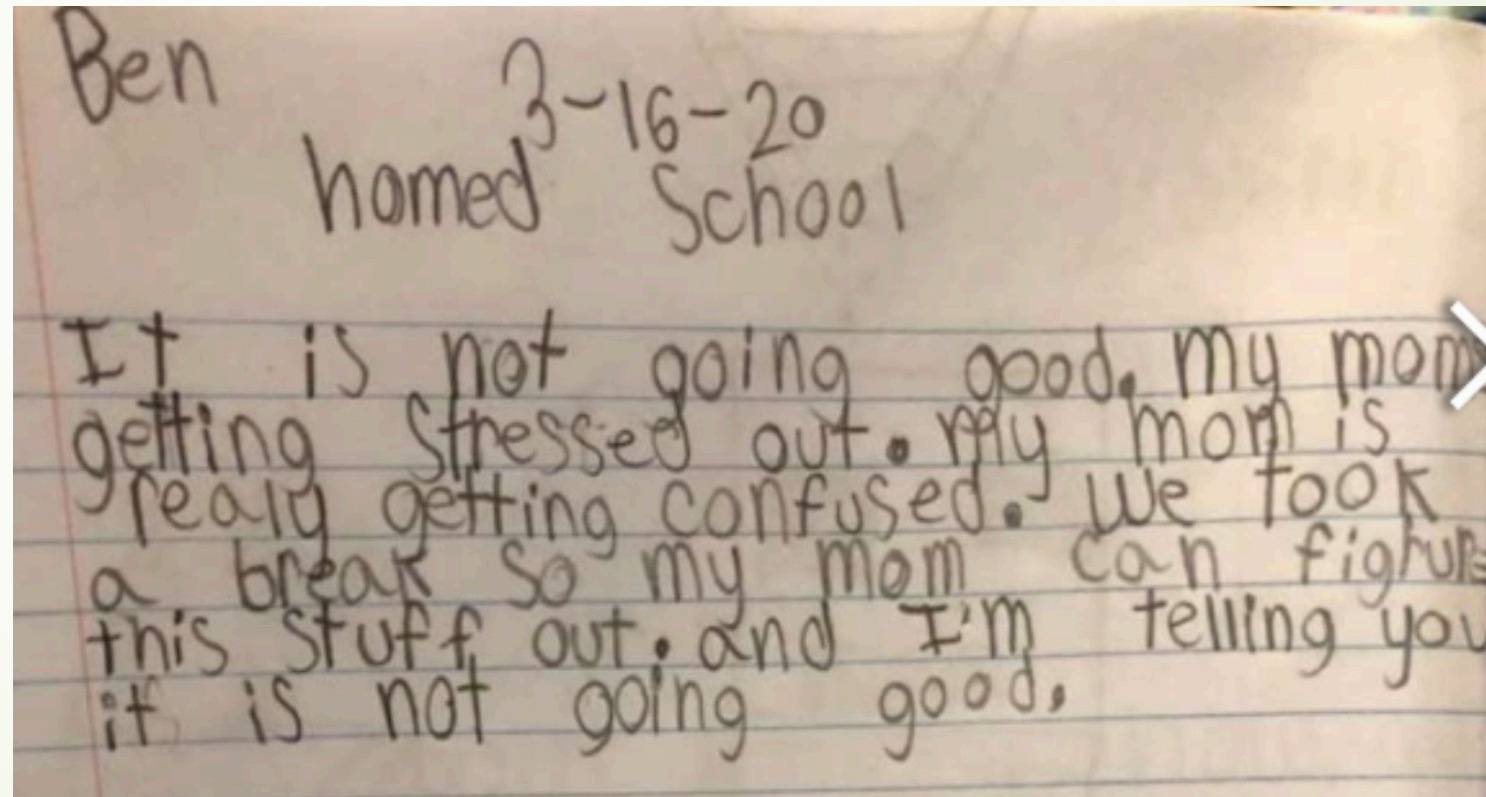


EXAMPLES USING 1:1 APPROACH (cont.)

Paraprofessional (Aide) Services Not Provided

- **No aide:** District directed to provide 120 minutes per week of support by a special education assistant for the time period the support was not provided or documented.
- Other options to consider, based on how absence of paraprofessional impacted the student :
 - Agree to specific number hours of tutoring on subject matter where had no paraprofessional;
 - If had aide for full day and absence of aide meant student unable to benefit at all, could seek one full day of compensatory services for each day without aide.
 - District agrees to pay for paraprofessional to attend outside activities with student.

VIRTUAL LEARNING PLACED HEAVY BURDEN ON PARENTS, STUDENTS & TEACHERS



Ben
3-16-20
homed School

It is not going good. my mom
getting stressed out. my mom is
really getting confused. We took
a break so my mom can figure
this stuff out. and I'm telling you
it is not going good.

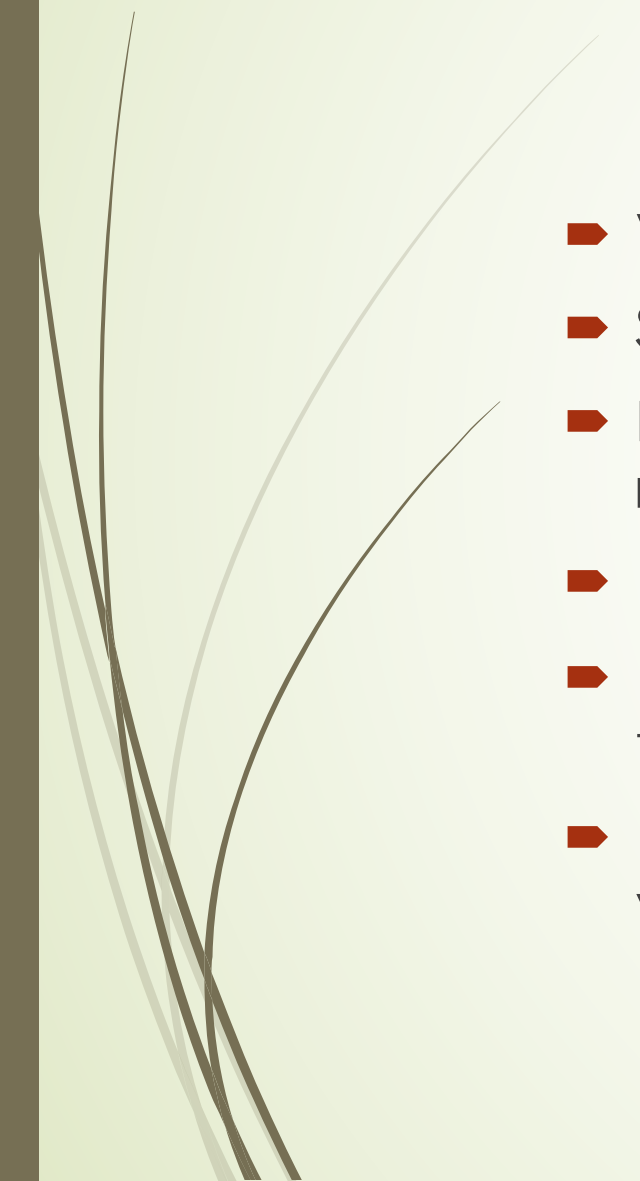


VIRTUAL INSTRUCTION

- N.J. State Board of Education enacted emergency regulations effective April 1, 2020
 - Allowing special education and related services to be implemented virtually, online platforms or telephonically but only
 - “as appropriate.”



REASONS VIRTUAL INSTRUCTION NOT APPROPRIATE MAY INCLUDE:

- Virtual program not individualized for student;
 - Student too young;
 - Limited direct instruction from teacher. Most lessons were recorded or links to commercial products
 - Vision, hearing or distractibility impaired ability to learn virtually;
 - Required continued in-person support in order to navigate technology and to learn;
 - Required additional supports not in IEP when instruction was virtual;
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Evidence That May Support Virtual Instruction Not Appropriate

- **Rate of Progress:** did child make the same amount of progress as they made during in-person instruction?
- **Regression:** did child lose academic, social, emotional, behavioral skills they had as of March 2020 and if so, specify.
- **New issues:** are there new concerns demonstrated during virtual learning?
- **Grades declined** [for example A's/B's to D;s/F's]
 - **Note:** some districts lowered grading standards during virtual instruction.
- **Informal assessments:** are there pre and post assessments to compare?
- **Teacher comments:** decline reflected in comments.




EVIDENCE THAT MAY SUPPORT VIRTUAL INSTRUCTION NOT APPROPRIATE (cont.)

- **Observations** of parent and those who observed child during virtual instruction
 - **Statements:** what parents/others saw while child did virtual learning and how they were impacted– *be specific.*
 - **Student letter** about the challenges they experienced.
 - **Letters from providers** who observed child (such as OT, PT, mental health provider, *etc.*).

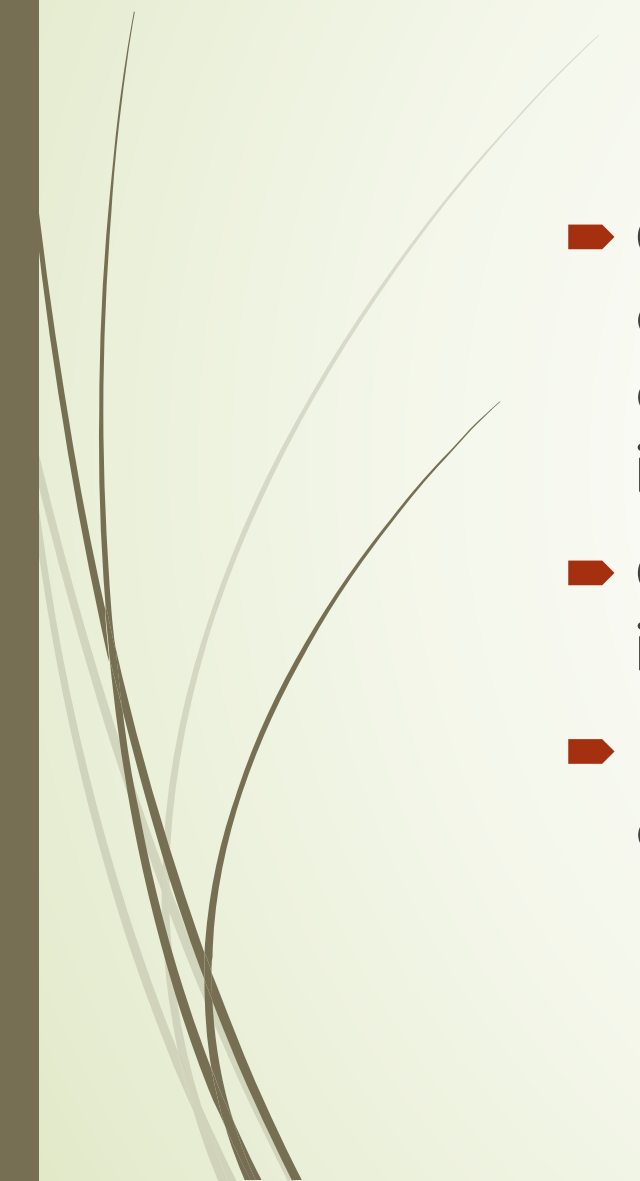


SUMMARY

- **List** school days when only received work packets or activity sheets with little to no contact with teacher or related service provider;
 - **Quantify or estimate** the # hours of missed related and special education services in IEP;
 - **List** the accommodations/modification not provided .
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SUMMARY (cont.)

- **Consider** if IEP services not received pervaded student's entire day; if so, may request 1 full day of compensatory education services for each day, IEP not fully implemented;
 - **Quantify** the amount of time that believe virtual instruction not "appropriate."
 - **Note:** Parents may choose for a variety of reasons, to agree to less than a 1:1 ratio.
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STATUTE OF LIMITATIONS FOR TAKING LEGAL ACTION

- Parents have two years from when they know or should have known of the problem to file due process.
- **Example:** if you knew on March 18, 2020 that your child was not receiving any special education services, you should file no later than March 18, 2022 for services not provided on March 18, 2020.
- **Example:** If instead, you are concerned about related services not provided starting on September 1, 2020, you would have until September 1, 2022 to file due process.



EXTENDING STATUTE OF LIMITATIONS

- Legislation pending in New Jersey Senate and Assembly to extend the Statute of Limitations to September 1, 2023.
- S905 unanimously passed the Senate Education Committee on February 3, 2022.
- A1281, as amended to be consistent with S905 was passed out of Assembly Education Committee on February 7, 2022.
- Still has to be voted on by entire Senate and Assembly and signed by Governor.
- **Write your Senator or Assembly Person urging passage of the bills.**



IEP MEETING TO DISCUSS COMPENSATORY SERVICES

- Make written request for IEP meeting to discuss need for compensatory services;
- If student placed in private school by your district, make request to your district with copy to private school.
- District must hold IEP meeting with you and representative from private school and make a written determination within 20 calendar days after written request is received, N.J.A.C. 6A:14-2.3(h)(5)i.



EXAMPLES HOW COMPENSATORY EDUCATION CAN BE PROVIDED


"The Ask" – Need to be prepared to describe to the team the compensatory education being requested, including how and when it should be provided.

How compensatory education can be provided includes:

- By district personnel or private providers selected by district;
- By private providers agreed to by district and parent;
- Placing student in private day or residential placement;
- Reimbursing parent for services obtained from private providers or that parent provided;
- Establishing fund of set amount allowed for compensatory services and allowing parent to arrange for compensatory services.



GRADE RETENTION: IS THIS RECOGNIZED FORM OF COMPENSATORY EDUCATION?

- Parents may request that their child be retained for a variety of reasons, including social, academic, behavioral and physical reasons.
 - Not aware of a court ordering a child to be retained as a form of compensatory education.
 - Educational experts have varied opinions on whether students are overall better off following retention.
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WHEN COMPENSATORY EDUCATION CAN BE PROVIDED

- After student ages out or receives high school diploma;
- Compensatory education must be in addition to services child is entitled to receive thorough the existing IEP or 504 plan;
 - For example: if child would attend ESY under their IEP or 504 anyway, ESY cannot be considered compensatory education unless additional services beyond the typical ESY are provided.
- Before or after school; on weekends; summer;
- During the school day: but not when student receiving special education and relates services as required in the IEP/504—nor when interferes with participation in the least restrictive environment (LRE).



POSSIBLE DISTRICT RESPONSES

- Student made progress, so not entitled to compensatory education;
- Only entitled to compensatory education if child regressed and didn't recoup lost skills after return to school;
- Services were provided to the "greatest extent possible" or the district acted in "good faith" during a pandemic.
- Districts don't have to provide 1:1 services, i.e. 3 hours of compensatory speech for 3 hours of speech not provided.
- **For more detailed responses, see FAQ on Compensatory Education in Response to COVID-19**
- *[https://edlawcenter.org/assets/files/pdfs/publications/FAQ%20on%20Compensatory%20Education%20in%20response%20to%20COVID-19%20\(2nd%20ed.%20Jan%202022\).pdf](https://edlawcenter.org/assets/files/pdfs/publications/FAQ%20on%20Compensatory%20Education%20in%20response%20to%20COVID-19%20(2nd%20ed.%20Jan%202022).pdf)*



OPTIONS FOR DOCUMENTING AN AGREEMENT FOR COMPENSATORY EDUCATION

- **Incorporate the agreement into the IEP:**
 - Specify what will be provided, when, and how.
 - If district does not provide compensatory education as set out in IEP or 504 plan, parent can file due process, emergent relief or mediation.
- **If enter into a separate settlement agreement and district does not comply**, can be enforced as a “contract” in state court so parent would likely need to hire an attorney to enforce.
- **If filed due process and district agrees, can ask ALJ to enter order approving settlement agreement.**
 - If district doesn't comply with agreement, can ask NJDOE to enforce settlement, file action in state court to enforce administrative decision or file action in federal court to enforce.



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