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QTA – A brief analysis of a critical issue in special education

Compensatory Education in Special Education

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by Eileen Ahearn

Introduction

This document was designed to provide information about the use of compensatory education in special education as it is ordered in the decisions that result from investigations under state complaint systems and mediation procedures. Although there is a lot of information about awards by due process hearing officers and courts, little information is available about compensatory education as it occurs in state complaint systems or in mediations. To fill this void, a review of all available information and a survey of state directors of special education were conducted by Project Forum under its cooperative agreement with the U.S. Department of Education's Office of Special Education Programs (OSEP). This document provides a brief background on compensatory education under the final regulations for the 1997 Individuals with Disabilities Education Act (IDEA), analyzes the findings from the state survey, and concludes with policy implications for states. *Note:* The IDEA was amended as of December 2, 2004 and it is possible that there will be revisions to the regulations related to compensatory education at the end of 2005 or the beginning of 2006.

Background

Compensatory Education

The IDEA requires state educational agencies (SEAs) to ensure that each public agency establishes, maintains and implements procedural safeguards that meet the requirements of Section 500 to 529 of the regulations [34 CFR §§300.500(a)]. These safeguards include the right of the parent or public agency to initiate due process procedures by requesting a hearing or seeking mediation on matters regarding the identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to the child [34 CFR §§300.506-300.507 and §§300.520-300.528]. There was no explicit provision addressing compensatory education in the original version of the regulations implementing the predecessor statute to the IDEA, the Education for All Handicapped Children Act of 1975 (EHA), Pub. L. 94-142. However, in 1986, the U.S. Court of Appeals for the Eighth Circuit held

that a “plaintiff who establishes a denial of a free appropriate public education in violation of the EHA is entitled to compensatory educational services” [*Miener v. Missouri*, 558 IDELR 123].¹

There are different types of dispute resolution mechanisms (i.e., complaint investigations, mediations and due process hearings) available under federal special education laws that might involve an award of compensatory education services. Shortly after courts began to order relief in the form of compensatory education to remedy the denial of FAPE, questions were raised about the authority of a hearing officer to award compensatory education in a due process hearing. In response to a 1991 inquiry, the Office of Special Education and Rehabilitative Services noted the authority of an impartial hearing officer “to grant any relief he/she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he/she is entitled” [*Letter to Kohn*, 17 IDELR 522, February 13, 1991].

Compensatory Education under State Complaint and Mediation Systems

States may grant compensatory education as the result of a complaint investigation. Under IDEA regulations (34 CFR §§300.660-300.662), each SEA must adopt written procedures for receiving and resolving complaints alleging violations of Part B. The authority of an SEA to grant compensatory education under the complaint procedures applicable to Part B of IDEA has been addressed in at least two OSEP policy documents: *Letter to Murray* [19 IDELR 496, September 25, 1992] and *Letter to Anonymous* [21 IDELR 1061, August 29, 1994]. Then, in the final regulations implementing the 1997 amendments to IDEA, the Part B complaint procedures were amended, and a section entitled, “Remedies for denial of appropriate services,” was added at 34 CFR §300.660(b). This section provides that, in resolving a complaint in which an SEA has found a failure to provide appropriate services, the SEA, pursuant to its general supervisory authority under Part B, must address “how to remediate the denial of those services including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child” [34 CFR §300.660(b)(1)].

States may also grant compensatory education as part of a mediation agreement. IDEA requires that the mediation process be at no cost to the parents and, at a minimum, that states make mediation available whenever a due process hearing is requested [34 CFR §300.506]. Mediation agreements could provide for compensatory education services.

Types and Conditions of Compensatory Education Services

Compensatory education may take many forms depending on the nature of the denial of FAPE and the age of the child. A claim for compensatory education may be “triggered” in different ways, for example, during the identification or evaluation process, with regard to the appropriateness or implementation of an individualized education program (IEP), as a result of failure to follow proper procedures and discipline (Groeschel, 2002, pp. 5-9). Awards may

¹ See also, *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), a case involving reimbursement for unilateral private school placement, where the Court noted that equitable considerations are relevant in fashioning relief under EHA. Although beyond the scope of this document, there are additional cases at the Federal appellate court level that also address compensatory education.

include services that extend beyond the regular school year, (i.e., extended school year); specific services such as instruction, related services or counseling; or even additional evaluation (Groeschel, 2002, p. 15-18).

The amount of time awarded as compensatory education is not always specified and, although the compensatory relief usually relates to the period of time in which the child was denied FAPE, there is no requirement that exact “day-for-day” compensation be awarded (Zirkel, 2001, p. 323). In addition, compensatory education may be awarded even if a student has already graduated. OSEP clarified this issue by stating that, if it is determined that a school district denied FAPE, the “student’s receipt of a regular high school diploma (a terminating event under the IDEA to the right to FAPE) did not negate the student’s independent right to compensatory education services...” [*Letter to Riffel*, 34 IDELR 292, August 22, 2000]. The letter further clarified that “a student’s decision to graduate with a regular high school diploma does not automatically relieve a school district of its responsibility to provide that student with compensatory education and related services awarded to the student.”²

Survey Results

During the months of July through September 2004, Project Forum surveyed state directors of special education about state policies on compensatory education as a remedy under their state complaint systems or in mediations. The questionnaire also included items asking whether the state collects and/or reports on data related to compensatory education awards and whether training or technical assistance is provided at the SEA or district level. Responses were provided in writing. A total of 44 states and two non-state jurisdictions completed the questionnaire for a response rate of 77 percent. Some responses included copies of material or website links to state-specific related documents. The following sections present the results of the survey and a description of the added comments and/or resources respondents provided on the topic of compensatory education.

State Policies on Compensatory Education

The 44 responding states have incorporated into their special education regulations or other policies the basic IDEA requirements related to remedies available when there is a finding of failure to provide appropriate services. Responses to the survey revealed that five states have written policies that are more detailed than the federal requirements. The five states described extended policies that are part of the state’s written procedures for handling complaints. No state cited any added policies covering compensatory education in mediations. The next sections provide a summary of the state policies provided by each of these five states.

² This document is focused on IDEA, but it should be noted that compensatory education is also available under Section 504 of the Rehabilitation Act that is overseen by the U.S. Department of Education’s Office for Civil Rights (OCR).

Arizona

Determination of the level of compensatory services occurs in one of two ways. After a letter of findings documents non-compliance, either the SEA directs the public education agency (usually a school district) to provide a specific amount and type of compensatory education, or the SEA directs that child's IEP team to reconvene to determine the level of compensatory services, if any, to be provided. If the IEP team makes such a determination, a "Compensatory Education Plan" form extracting language from the written materials must be attached to the letter of findings resulting from the complaint investigation. State complaint procedures also include specific steps that must be followed to appropriately implement and document the provision of the corrective action (i.e., compensatory education).

Massachusetts

Requirements for handling compensatory services are contained in an SEA memorandum to SEA staff and supervisors that was based on discussions with OSEP and the state's legal office. The compensatory education may be ordered through the letter of findings resulting from a complaint investigation by the SEA, or the parent and school district may work out a mutually agreeable plan for compensatory services. Specific state forms have been developed to document these actions. The policy further provides that, if the district and the parent are unable to develop a mutually agreeable plan, the SEA will do so on the basis of information from both parties and will direct the district to implement it.

Pennsylvania

SEA written policy contains detailed procedures to be followed to determine compensatory education services. If the compensatory education is quantifiable (e.g., number of days of service), specific language for the compensatory education statement is suggested. The complaint investigation report must clearly identify the services not provided and the amount of time involved and, when possible, quantify any replacement services. Efforts are made to address the family's requests, although cost can be a factor in determining whether the family's proposal is reasonable. Additional information provided in the policy describes situations that would not result in a determination of compensatory education.

Iowa and North Carolina

Policies in these two states include only a brief addition to the basic federal requirements that cover actions to be taken if a student transfers to another district after the issuance of a compensatory education order. The North Carolina policy includes a simple statement that the LEA or charter school remains responsible for the provision of compensatory education services even when the student moves to another LEA within the state. The Iowa policy makes a similar statement and adds that the former district may meet this requirement either by negotiating a written arrangement with the new school to provide the services and reimburse excess costs by contracting with a private provider or by continuing to offer the services. Iowa's policy also requires that the parent be involved in the decision about the nature and timing of the compensatory education provided in the new district.

Data on Compensatory Education Awards

Six of the 44 responding states collect data on the awarding of compensatory education as the result of complaint investigations. However, three of these states do not at this time produce data in a form that can be shared. *California* collects, but does not report data in this area; *Delaware* collects informal data; and *Michigan* is currently developing a comprehensive database for such data.

The three states that provided Project Forum with compensatory education reports each handle the data differently. The following is a summary of the data provided by those states.

Arkansas

Arkansas provided a table covering due process hearing decisions and complaint investigation reports of cases involving issues that could have resulted in compensatory education because of a denial of FAPE during the last three school years (2001-02, 2002-03 and 2003-04). The table included the following three types of information: the issue(s) related to a possible denial of FAPE, the amount of compensatory education awarded and the areas of compensatory education. Data presented by school year were as follows:

- 2001-02: Of the 12 cases that were eligible for compensatory education, three received an award and nine did not. Of the three awards, one was for failure to implement an appropriate IEP and the exact award was to be determined by the IEP team, the second case award was 41.5 hours of speech therapy. The third involved denial of FAPE to all students with disabilities in a specific charter school and the settlement ordered the charter school to provide a budget of \$31,455 for special education.
- 2002-03: Of the 15 cases that were eligible for compensatory education, one received an award while the remaining 14 did not. The one award resulted from a finding of failure to implement an IEP and a Behavioral Intervention Plan and the compensation determination was to be made by the IEP team.
- 2003-04: Of the 14 cases that were eligible for compensatory education, three received an award while the remaining 11 did not. The three awards involved providing a specific number of hours in designated areas: Case #1 – 97 hours in math and geography for failure to implement an IEP and inappropriate removal from school; Case #2 – 24 hours of speech therapy; Case #3 – a multiple award of special education services that included 10 occupational therapy sessions, 20 speech therapy sessions and 60 hours of special education for failure to comply with timelines related to transition from an early childhood program.

Oregon

Oregon provided a table entitled, “Complaint Corrective Action Types by Frequency,” that gave the total number of incidences of 10 types of corrective action for each of three years – 2002, 2003 and 2004 (to date). Details about the nature of the compensatory education provided were not included.

- 2002: Of the 70 cases that issued corrective actions, five (7%) involved compensatory education.
- 2003: Of the 42 cases that issued corrective actions, six (14%) involved compensatory education.
- 2004 (to date): Of the 11 cases that issued corrective actions, two (18%) involved compensatory education.

West Virginia

West Virginia provided an extensive complaint summary table covering the time period July 1, 2002 through June 30, 2003. It describes each complaint, including the name of the district, the specific issues involved, policy citations for those issues, whether each issue was found to be a violation and any corrective actions required. Of the 111 total cases, 16 involved a compensatory education award. The specifics of the services to be provided were not included in all cases, but compensatory education was awarded for violations in the following areas:

- student progress reports;
- extended school year;
- IEP implementation (5);
- full instructional day;
- programs and services for students who are deaf and hard of hearing (2);
- re-enrolling upon request a student who had left school without graduating;
- attendance policies and procedures (2);
- math services; and
- speech services.

Data on Training and Technical Assistance

In response to a questionnaire item, 18 states of the 44 responding states indicated that they provided training or technical assistance to SEA or LEA staff on compensatory education. However, some of the other responding states mentioned elsewhere in the survey that they provide training. Although there were differences in the specifics mentioned, no state described formal training activities that especially addressed the issue of compensatory education beyond initial training of complaint investigators or hearing officers or an occasional presentation at a state or regional meeting. Most of the states responding to this item mentioned that training and/or technical assistance is available on an informal, case-by-case, as-needed or as-requested basis. One state, Rhode Island, has a statewide training initiative for state and local agencies that provides technical assistance on IDEA requirements, including the topic of compensatory education (for more information, see www.ritap.org).

Observations and Policy Implications

The awarding of compensatory education through complaint investigation or mediation is not a frequent occurrence in states, but it is a critical issue because it reflects one of the outcomes of disputes between families and schools and it can involve the expenditure of significant resources

in the form of funds and/or staff time. The results of Project Forum's survey revealed that states have developed very little in the way of policies or documentation concerning compensatory education beyond the basic federal requirements.

Although states have incorporated federal requirements related to compensatory education into their laws, regulations or other policy directives, very few have written procedures to guide their implementation. Two states that do have written procedures related to compensatory education are Pennsylvania and Massachusetts. Such guidance could be very helpful for tracking data about compensatory education, ensuring consistency in practice by current staff and orienting new staff. In addition, training and technical assistance by states related to compensatory education appears to be a need in over half the states.

There are a number of reasons why states might want to track and analyze data on awards of compensatory education. For example, the pattern may be very informative for the planning of training or technical assistance. In addition, multi-year data can be used to evaluate the state's policies and procedures pertaining to dispute resolution and support the dissemination of successful practices.

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Ph: 703-519-3800 ext. 312 or Email: Hcarla.burgman@nasdse.org