



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES  
OFFICE OF SPECIAL EDUCATION PROGRAMS

January 10, 2022

OSEP Policy Letter 22-01

Phyllis Wolfram, Executive Director  
Myrna Mandlawitz, Policy/Legislative Consultant  
Council of Administrators of Special Education (CASE)  
1675 E. Seminole St.  
Suite L1  
Springfield, MO 65804

Dear Ms. Wolfram and Ms. Mandlawitz,

We want to thank you for meeting with us and Office of Special Education Programs (OSEP) staff on October 21, 2021 and your follow-up correspondence dated October 30, 2021 (October letter) regarding the U.S. Department of Education's (Department's) September 30, 2021 [Return to School Roadmap: Development and Implementation of Individualized Education Programs](#) guidance document. We are pleased that, generally, CASE and its undersigned partners found the document helpful in addressing the needs of children with disabilities as we continue to navigate through the COVID-19 pandemic. In our discussion and in the correspondence, CASE and its undersigned partners expressed concerns with the Office of Special Education and Rehabilitative Services' (OSERS') position regarding compensatory services in Section D of the guidance document, "Determining Appropriate Measurable Annual Goals & Considering the Child's Need for Compensatory Services."

The October letter raises concerns with respect to when and whether compensatory services are appropriate and by whom this determination is made. We respectfully disagree with the analysis in the October letter. The information presented in Section D is consistent with OSERS' longstanding position on the use of compensatory services in circumstances when a child with a disability is not provided appropriate services under the Individuals with Disabilities Education Act (IDEA) due to uncontrollable circumstances or reasons.

We disagree that the provision of compensatory services is appropriate only in context of an order for equitable relief (e.g., by a hearing officer or court) or as a remedy for the loss of special education and related services determined by filing a State complaint. First, this is not a new interpretation. In prior guidance documents, we have stated that, generally, the decision to provide "make up" or compensatory education when there is a disruption in the provision of educational services, and the nature and amount of the special education and related services that are to be provided as compensatory education, is an individualized determination made by the individualized education program (IEP) Team in accordance with the requirements in 34 CFR §§300.320-300.324. That is, the IEP Team must determine whether the child was denied

educational benefit because of the disruption in educational services and whether compensatory education is needed to “make up” for the denial including addressing any skills that may have been lost. As an example, OSEP’s [\*Questions and Answers on Providing Services to Children with Disabilities during an H1N1 Outbreak\*](#) (Dec. 2009), stated:

If a child does not receive services during a closure, a child’s IEP team (or appropriate personnel under Section 504) must make a subsequent individualized determination to decide whether a child with a disability requires compensatory education to make up for any skills that may have been lost because the child did not receive educational benefit.<sup>1</sup>

In addition, OSERS has provided similar guidance regarding compensatory services resulting from educational disruptions due to teacher strikes<sup>2</sup> and certain natural disasters.<sup>3</sup>

The CASE memorandum — *Addressing Compensatory Services: CASE Review of U.S. Department of Education IEP Guidance (September 2021)* – accompanying the October letter raised the concern that the use of a “‘make-up services through compensatory services’ model as to address situations where the special education and related services required in a child’s IEP are not provided is in violation of the current *Endrew F.* standard of [free appropriate public education].” We do not agree.

Foremost, *Endrew F. v. Douglas County School District Re-1, 137 S.Ct. 988 (2017) (Endrew F.)* was not about the failure to implement or fully implement an appropriate IEP, but rather the judgment that the various nearly identical IEPs that the school district had drafted over several years **did not** offer sufficient educational benefit. In its unanimous decision, the Court affirmed that “a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Citing *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, the Court explained that the “‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials” (emphasis added). Here, the term “prospective” addresses the IEP Team’s work in developing an appropriate IEP, not in its actual implementation. The Court also did not address the specific relief required in the case, but rather remanded those considerations to a lower court for resolution. Accordingly, the district court found that the:

District’s April 2010 IEP failed to create an educational plan that was reasonably calculated to enable Petitioner [*i.e.*, *Endrew F.*] to make progress, even in light of his unique circumstances. The IEP was not appropriately ambitious because it did not give Petitioner the chance to meet challenging objectives under his particular circumstances. Specifically, the IEP proposed by the District was not reasonably

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<sup>1</sup> See <https://www2.ed.gov/policy/speced/guid/idea/h1n1-idea-qa.pdf>.

<sup>2</sup> See OSEP’s Letter to Pergament (Dec. 20, 2013), at <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdeltrs/12-023414-il-pergament-makeup.pdf>.

<sup>3</sup> See Question C-1 in the Department’s Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters (Sep. 2017), at <https://safesupportivelearning.ed.gov/sites/default/files/disaster-guidance.pdf>.

calculated for Petitioner to “achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”<sup>4</sup>

As a result, the district court ordered the reimbursement of the student’s private school placement as well as reasonable attorney fees and litigation costs. Nowhere in these opinions is the role of the IEP Team circumscribed or limited, where there has been a failure to implement or fully implement the special education and related services that are required to address the goals in an appropriately challenging IEP. Moreover, there is no other reason to believe that an IEP Team is incapable of determining the need for, and extent of, compensatory services.

OSERS has recognized, and will continue to recognize, that State educational agencies and local educational agencies (LEA) have worked hard throughout the COVID-19 pandemic to develop IEPs that meet the standard articulated in *Endrew F.*, to prospectively address the needs of children with disabilities and provide them with the special education, related services, and supplementary aids and services required to receive a free appropriate public education (FAPE). We know from previous statements that CASE and some other signatories agree with OSERS that even with these efforts, some children with disabilities were unable to receive the appropriate services addressing their learning needs so that they could make progress toward achieving the functional and academic goals specified in their IEPs. With that said, parents have reported to OSERS that many children with disabilities and their families have been especially impacted by the disruption in educational services because of the COVID-19 pandemic and that some children simply did not receive an educational benefit from the limited virtual instruction and services that some school districts were able to provide. Considering the significant achievement gaps that too often exist between children with disabilities and their nondisabled peers, there is a sense of immediacy and urgency in working to address these gaps and accelerate learning for children with disabilities. Further, with nearly \$200 billion of additional Federal COVID-19 relief funds through the Coronavirus Aid, Relief, and Economic Security Act, the Coronavirus Response and Relief Supplemental Appropriations Act, and the additional IDEA funds awarded through section 2014 of the American Rescue Plan Act of 2021, that can be used for any purpose under IDEA, any additional financial burdens related to providing compensatory services have been significantly alleviated from States and school districts.

One of IDEA’s basic tenets is to bring together the parents and school personnel to address the individual needs of each eligible child with a disability through the use of an IEP Team.

Consistent with this, we believe that in situations where compensatory services are necessary to address the impact of service disruptions and limitations on a particular child, school personnel and the child’s parent should work together collaboratively to develop a plan for providing such services in a reasonable manner. It is inconsistent with IDEA to require such parents to file a State complaint or a due process complaint as the only vehicle for obtaining compensatory services—and then to return to an IEP Team meeting to determine what those services will be.

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<sup>4</sup> See February 12, 2018 Memorandum and Order: *Endrew F. v. Douglas County School District RE 1*, No. 12-2620 (D. Col.), at [https://www.govinfo.gov/content/pkg/USCOURTS-cod-1\\_12-cv-02620/pdf/USCOURTS-cod-1\\_12-cv-02620-4.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-cod-1_12-cv-02620/pdf/USCOURTS-cod-1_12-cv-02620-4.pdf)

CASE and its undersigned partners play an important role in ensuring the full implementation of IDEA. As always, staff at OSEP are available to assist CASE and its undersigned partners in efforts to provide FAPE to all eligible children with disabilities. Please contact Gregg Corr, Director of OSEP's Monitoring and State Improvement Planning Division, at [Gregg.Corr@ed.gov](mailto:Gregg.Corr@ed.gov) if you would like to discuss this letter further.

Sincerely,

/s/

Katherine Neas  
Deputy Assistant Secretary  
Delegated the authority to perform the  
functions and duties of the Assistant  
Secretary for the Office of Special  
Education and Rehabilitative Services

/s/

Valerie C. Williams  
Director  
Office of Special Education Programs

CC:

AASA, The School Superintendents Association  
Association of Educational Service Agencies  
Association of School Business Officials  
International Council of the Great City Schools  
National Association of Elementary School Principals  
National Association of Secondary School Principals