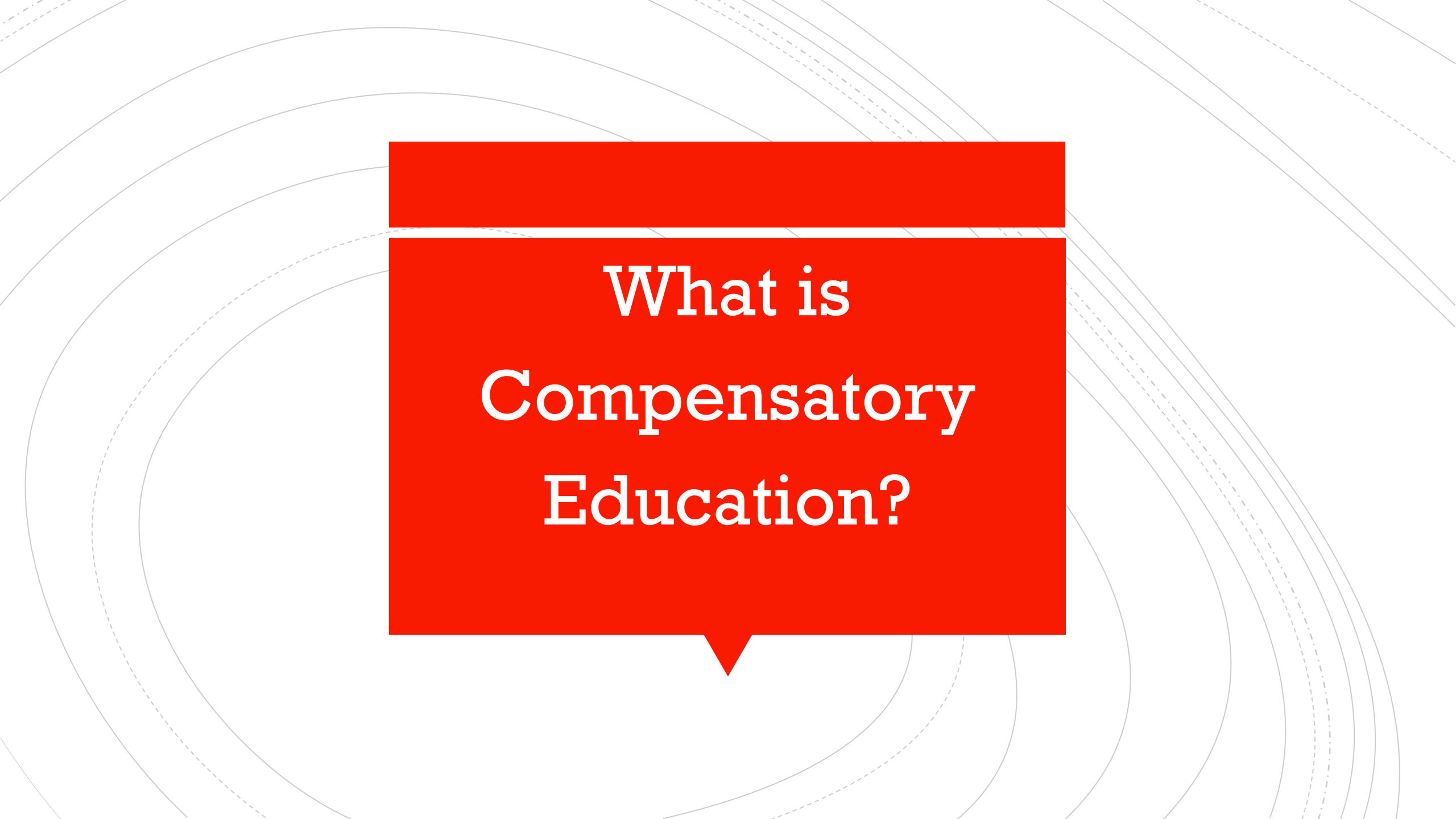


# Compensatory Education In the Wake of COVID

[Andrew Feinstein, Esq.](#)

[afeinstein@edlawct.com](mailto:afeinstein@edlawct.com)

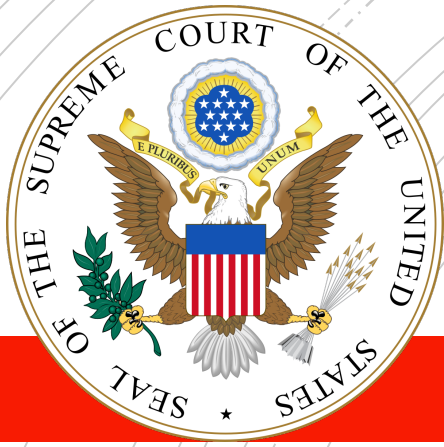
860-969-0700

The background features a series of concentric circles in light gray, some solid and some dashed, creating a ripple effect. A large red speech bubble is centered on the page, containing the text.

# What is Compensatory Education?

The IDEA requires a school district to provide a free appropriate public education (FAPE) to each student with a disability by providing an Individual Educational Program (IEP) designed to meet that student's unique needs. 20 U.S.C. § 1412(a)(1).





Andrew F.

- IEPs must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”
- All students are due “the chance to meet challenging objectives.”
- Second, the IEPs of students not fully integrated in traditional educational settings “must be appropriately ambitious in light of [their] circumstances.”

# CSDE Addendum 6



- School districts are required to provide a free appropriate public education (FAPE) to each student determined eligible and for whom the parent has provided written consent for the provision of special education and related services.
- Federal disability law allows for flexibility in determining how to meet the individualized needs of students receiving special education services. During the COVID-19 pandemic, the delivery of FAPE to all students may vary depending on the instructional delivery model (i.e., Full In-school Learning, Remote Blended Learning (Hybrid), Full Remote Learning) being followed.
- Students with disabilities should be prioritized for receiving instruction in school during the 2020–21 school year, even if schools are operating in a Hybrid or Remote model.

## Addendum 6 Continued

When it is not possible to deliver specific IEP services as originally intended, creative solutions and adjustments to instructional delivery and/or the environment will be necessary.

While weighing the options on how to best address these issues, the requirement that students with disabilities are educated in the least restrictive environment (LRE) must be considered.

Meaningful and ongoing communication between the school district and families is more important now than ever.



## Learning Model Implementation Plan

The CSDE has developed The Learning Model IEP Implementation Plan form for districts to document the delivery of special education and related services that may be affected by the school district's response to the pandemic.

The Learning Model IEP Implementation Plan must be used to describe any differences in the delivery of IEP services and will serve as the required notice to parents.

It is permissible but not required to discuss The Learning Model IEP Implementation Plan during a planning and placement team (PPT) meeting.

A change in delivery of IEP services due to a transition to a different instructional delivery model alone does not constitute a change of placement.

## IEPs during COVID

- IEP teams should develop IEPs that provide FAPE as though the student will be attending school full time, in-person under normal health conditions.
- If a parent opts into remote learning, school districts must have the student's IEP ready to be implemented at the start of the 2020–21 school year. The IEP must be developed as if the student is participating in full time in-school learning and if needed a Learning Model IEP Implementation Plan must be created to appropriately illustrate the special education and related services the school district is prepared to deliver.
- There may be cases where it is not possible to maintain an individual student's LRE while also implementing physical distancing requirements and cohorting. In these cases, the school district must justify the change in location of the service in The Learning Model IEP Implementation Plan.



**Learning Model IEP Implementation Plan**

Student: \_\_\_\_\_ SASID: \_\_\_\_\_ School: \_\_\_\_\_ Special Education Case Manager: \_\_\_\_\_

Plan based on IEP dated: \_\_\_\_\_ Date plan implemented: \_\_\_\_\_ Date plan revised: \_\_\_\_\_

<b>Specially Designed Instruction/ Related Service</b>	<b>Supporting IEP Goal(s) #</b>	<b>Description of Model (full in-school, hybrid, remote), Mode(s) (in person/remote), and Manner(s) in which the Service will be delivered (how and where), only if different from the IEP</b> <small>*Districts may provide supplemental information to parents (e.g., student schedules)</small>	<b>Frequency/ Duration</b>	<b>Service Implementer(s)</b>
		Model: Mode: Description:		
		Model: Mode: Description:		
		Model: Mode: Description:		

**Confidentiality and Privacy Disclaimer:** This district remains obligated to protect students' confidentiality and privacy.  
Remote learning does not enable the district to control who is viewing a lesson, and therefore parents should be aware that there is no expectation of privacy.



## Comp Ed Definition

- Compensatory education is an equitable remedy to remediate the loss of a FAPE for a period of time. It aims to provide “services prospectively to compensate for a past deficient program.”  
*Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008).

# Comp Ed Design

Compensatory education is designed to put a student in the place he/she would have been had the student not been deprived of special education and related services. The content of a program of compensatory education needs to be based on a student's individual level of performance.



# Reid Standard



Such awards “should place children in the position they would have been in but for the violation of the Act.”

*Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).



No-Fault

An award of compensatory education **does not** require a finding of negligence or fault on the part of a school district. Instead, compensatory education merely remedies a loss of special education services without regard to the cause of that loss.

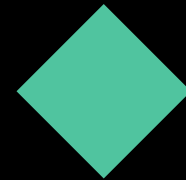
# Threshold



Services Listed in IEP Not  
Delivered;



Student Failed to Make  
Progress Contemplated  
in IEP;



Failure to Make Progress  
Attributable to Loss of  
Services.

EXPERT

**You cannot win a  
claim for compensated  
in a due process  
hearing without  
an expert.**



Every federal Circuit Court of Appeals has recognized that compensatory education is an appropriate remedy to redress a school district's denial of FAPE.



The loss of special education services due to a COVID-19 forced school closure may entitle students to compensatory education.

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

COVID 19



Two Approachs to a Comp Ed Award





## Quantitative

With a “quantitative approach,” the court provides an hour for hour replacement of services lost. The Third Circuit articulated the standard: “a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem.” *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996).

## Qualitative

More recently, courts have relied on the “qualitative approach.” Instead of looking at services lost, the qualitative approach looks to the educational benefit lost. Referring to the quantitative approach, the *Reid* court said, “this cookie-cutter approach [quantitative] runs counter to both the ‘broad discretion’ afforded by IDEA’s remedial provision and the substantive FAPE standards that provision is meant to enforce.” *Reid.*, 401 F.3d at 523.



# Assessment Based

Awards should be based on individualized assessments, leading to different results depending on the differing needs of students. “The inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid* at 524.



A red speech bubble graphic with a white outline, pointing downwards. It contains the text "Comp Ed is above FAPE" in white. The background of the slide features faint, curved, concentric lines in the top-left and bottom-right corners.

Comp Ed is  
above FAPE

Need to provide evidence regarding the child's specific education deficits and the specific compensatory measures required to correct them. *Reid*, 401 F.3d at 526.

**By contrast to ordinary education programs which need only provide 'some benefit', compensatory education awards "must do more – they must compensate." *Reid*, 401 F.3d at 518.**





Regardless of whether courts take a quantitative approach or a qualitative approach, they agree that, when students are deprived of FAPE because school districts have violated or were unable to comply with the substantive requirements of IDEA, including Child Find, students are entitled to an award of compensatory education.

The background features a series of concentric circles in light gray, some solid and some dashed, creating a ripple effect. A large, solid red oval is positioned in the center, containing the text. A dark gray, curved shape is visible on the left side, partially overlapping the red oval.

# Remedial Services vs. Comp Ed



## General Remedial Services

School districts will argue that all students suffered from a loss of educational services, that students with disabilities who are eligible for special education are general education students first and foremost, and that the remedial education planned for all students will compensate special education students for their lost educational opportunities as well.

A student with an IEP has certain goals and objectives to meet in the time period of the IEP. To meet those goals, supplemental individualized services are provided in the IEP.

While general remedial services will be helpful in many cases, they do not take the place of compensatory education in making up for lost education during COVID-19 closures and distance learning.



## CLAIM

All students suffered from a reduction in services because of school closings

A red speech bubble graphic with a white outline, pointing downwards. The word "Answer" is written in white text inside the bubble.

Answer

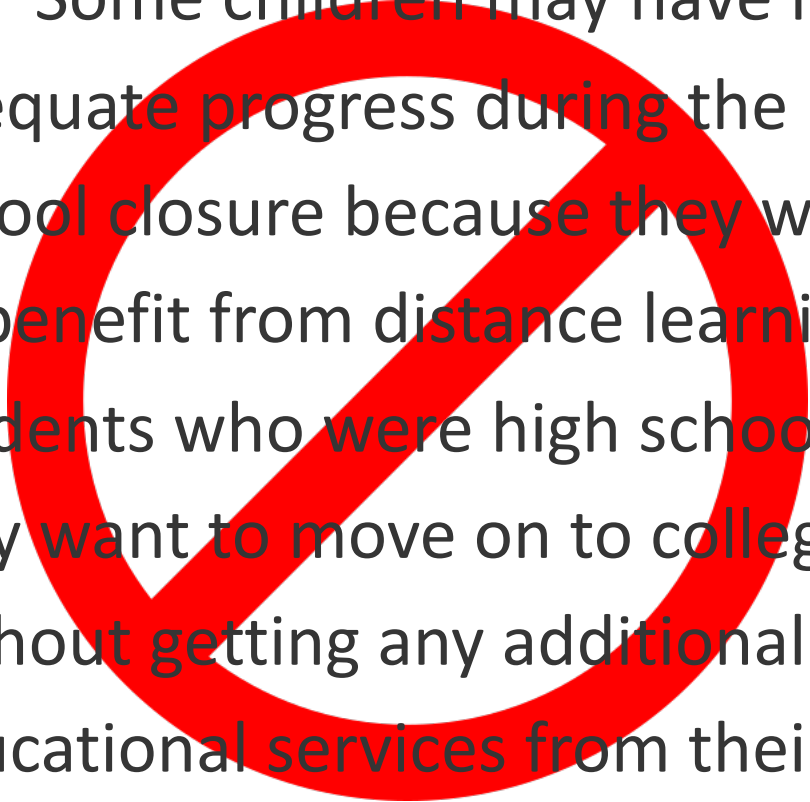
Federal law requires school districts to provide FAPE to eligible students. Eligible students who were deprived of FAPE during the school closings are entitled to compensatory education.

# Comp Ed for Everyone?

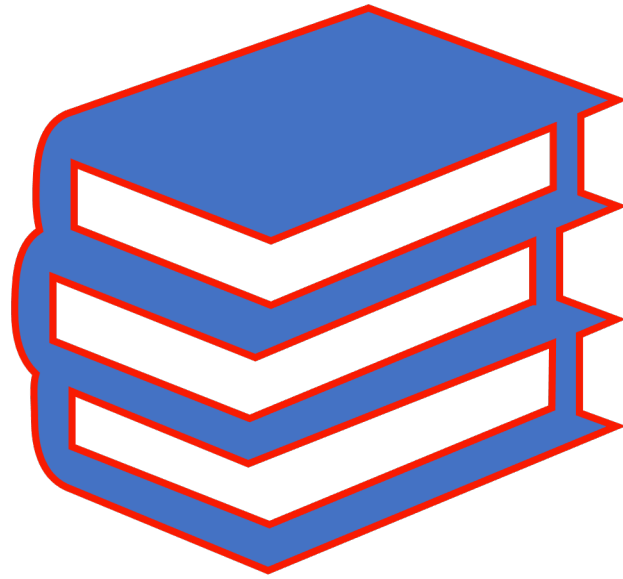
Will all children with IEPs be entitled to compensatory education because they lost out on in-person teaching expected in their IEPs?



Nope



No. Some children may have made adequate progress during the period of school closure because they were able to benefit from distance learning. Some students who were high school seniors may want to move on to college or work without getting any additional educational services from their school districts.



Who Gets Comp Ed?

The child's IEP team needs to meet and determine present levels of performance as a prerequisite to designing a program and placement.

Parents should have a significant voice in setting the current level of performance.

If the student's performance is below where it was on the day schools closed for the COVID -19 pandemic, the IEP Team will be obliged to provide more intense services than those provided in the prior IEP.



Present  
Levels

Data, data, data

Students who failed to benefit from remote education may be eligible as well. Not every student will need remedial services. Some students will progress appropriately in the at-home program. Others will experience significant regression. In each case, the IEP team must, after the closure ends, closely examine the student's progress or regression, craft accurate present levels of performance, and provide services based on the needs established by the data.



DATA



KNOWLEDGE



ACTION



## No money

School districts may claim to be financially strained in reopening after the COVID-19 closure. This is doubtful. Local school districts have been flooded with money under the two stimulus bills, with more to come.


The right of a student with a disability to a free appropriate public education (FAPE) is an entitlement under federal law. School districts are free to opt for more economical alternatives provided, however, that the educational program provided meets the standard of a FAPE.



A graphic featuring the text "OUR BIG PLAN" in large, bold, blue capital letters. The text is centered within a light blue rectangular area. Above and below this area are solid red horizontal bars. The light blue area is decorated with a background pattern of faint, overlapping icons including a globe, a person, a heart, and a television. Below the text, there are four distinct icons: a red-bordered monitor with a blue 'i' and a play button, a green cloud with a red play button and a green arrow pointing down, a blue circle with 'cc' (Creative Commons), and a blue circle with a person icon. To the right of these icons is a green television set.

## OUR BIG PLAN

Some have proposed awarding compensatory education to students in a state or students in a district to avoid the transactional costs of evaluating individual claims of the 7 million students with IEPs in the country.

The background of the slide features a series of thin, curved lines in light gray and white, creating a sense of motion and depth. These lines are more prominent on the left side and fade towards the right.

Expeditious, Cost  
Effective,  
Amicable,  
Individualized

The best way to for school districts to provide compensatory education is to work with parents of students with disabilities to design educational programs to place these children where they would have been but for the closure.

Special education programming is inherently and fundamentally individualized.

That means that a general program of remedial education is unlikely to meet the compensatory education needs of each student with an IEP.

If parents disagree with the compensatory education recommended by the school district, they can use the dispute resolution mechanisms available: mediation, a state complaint, or a due process hearing.



## Dispute Resolution



# State Complaint Process

Under the IDEA, each state needs to have a complaint process which is free to parents and ensures that school districts are complying with the law. The process works well for clear violations of the law. Most states will, however, defer decisions on the appropriateness of programs, believe that due process hearings exist to make those determinations.



## COVID Discriminates Against Students with Disabilities

COVID-19 shut down schools around the country. Many schools implemented programs of remote learning. For many students with disabilities, the lack of in-person contact meant that the student received no education. For others, the lack of structure led to behavioral deterioration.

**Compensatory Education is the only way to remediate this blatant discrimination.**