

COVID-19 CONFUSION: COMPENSATORY SERVICES AND COMPENSATORY EDUCATION

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I. INTRODUCTION

COVID-19 is “unprecedented” in not only a general but also an adjudicative sense. Soon after the outset of the pandemic the U.S. Department of Education (“ED”) issued informal guidance specific to students with disabilities under not only the Individuals with Disabilities Education Act (“IDEA”)¹ but also the broader coverage of Section 504 of

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the Rehabilitation Act (“Section 504”).² The guidance included the agency’s interpretations that (a) the obligation to provide these students with free appropriate public education (“FAPE”)³ applies during the pandemic “to the greatest extent possible,”⁴ and (b) the school teams responsible under the IDEA and Section 504 must “make an individualized determination as to whether *compensatory services* are needed under applicable standards and requirements.”⁵

In comparison, lower court case law well before the pandemic developed the remedy of *compensatory education* within the broad adjudicative authority for equitable relief for denial of FAPE under the IDEA.⁶ Compensatory education is an extension of and partially analogous

¹ 20 U.S.C. §§ 1400–1419 (2018).

² 29 U.S.C. § 794 (2018). The more extensive coverage here refers primarily to the broader definition of disability, which also applies to private schools that receive federal financial assistance and postsecondary education. *Id.* §§ 705(20)(B), 794(a)–(b).

³ 34 C.F.R. § 300.101 (2019) (FAPE under the IDEA); *id.* § 104.33 (FAPE under Sec. 504).

⁴ U.S. DEP’T OF EDUC. [ED], QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS 2019 OUTBREAK, at A-1, 76 IDELR ¶ 77 (Mar. 12, 2020), <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf> [<https://perma.cc/G7QY-JTNG>]. The guidance alternatively refers to school districts’ obligation to “make every effort to provide [FAPE].” *Id.*

⁵ *Id.* (emphasis added). In this guidance document’s subsequent items concerning children with disabilities who do not receive services due to school closure or COVID-19 illness, the guidance adds a bit more specificity by characterizing this obligation as individually determining “whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost.” *Id.* at A-2 and A-3 (emphasis added); see also ED OFF. FOR CIVIL RIGHTS [OCR], FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS 3, 76 IDELR ¶ 78 (Mar. 16, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf> [<https://perma.cc/S5XK-9YGY>]. In supplemental guidance, ED specified the effective time for effectuating this obligation as “when schools resume normal operations.” ED OFF. FOR SPECIAL EDUC. & REHABILITATION SERVS. & OCR, SUPPLEMENTAL FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING STUDENTS WITH DISABILITIES, 76 IDELR ¶ 104 (Mar. 21, 2020), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> [<https://perma.cc/HVG3-C9XV>].

⁶ *E.g.*, Perry Zirkel, *Compensatory Education Under the Individuals with Disabilities Education Act: The Third Circuit’s Partially Mis-Leading Position*, 110 PENN. STATE L. REV. 879, 884 (2006) (citing, *e.g.*, Lester v. Gilhool, 916 F.2d 865 (3d Cir. 1990); Miener v. Missouri, 673 F.2d 969, 982 (8th Cir. 1982)). For recognition that compensatory education is an extension of the Supreme Court’s original tuition reimbursement decision in *Burlington School Committee v. Department of Education*, see, *e.g.*, Reid v. District of Columbia, 401 F.3d 516, 522 (D.C. Cir. 2005); Miener v. Missouri, 800 F.2d 749, 753 (8th Cir. 1986). For the most recent in a series of annotated compilations of the case law specific to compensatory education, see Perry A. Zirkel, *Compensatory Education: The Latest Update of the Law*, 376 EDUC. L. REP. 850 (2020).

to the more clearly settled remedy of tuition reimbursement.⁷ However, its sole predicate for compensatory education is denial of FAPE, without the added steps of timely notice and appropriateness of the private placement in tuition reimbursement analysis.⁸ Similarly, in the absence of a definitive amount as the starting point for the reimbursement remedy, the approach for the calculus for compensatory education is not uniform and clear-cut.⁹

The leading approach for calculating compensatory education is based on the U.S. Court of Appeals for the D.C. Circuit's analysis in *Reid v. District of Columbia*.¹⁰ Expressly rejecting the mechanical, "cookie-cutter" nature of the hour-for-hour quantitative approach as being "counter to both the 'broad discretion' afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce,"¹¹ the *Reid* court's flexible qualitative approach calls for providing the "services [the child] needs to elevate him to the position he would have occupied absent the school district's [denial of FAPE]."¹²

A second significant ruling in *Reid* was that hearing officers may not delegate the calculation of compensatory education to the child's IEP team. More specifically, because the hearing officer awarded 810 hours of compensatory education but delegated to the IEP team the authority to reduce or discontinue this award, the *Reid* court limited its ruling to "a delegation that permits the team to reduce or terminate [the hearing

⁷ E.g., Zirkel, *supra* note 6, at 894–95 (explaining the differences from the multi-step analysis for tuition reimbursement, which was established by a series of Supreme Court decisions and the codification in the IDEA).

⁸ See, e.g., Perry A. Zirkel, *Tuition and Related Reimbursement Under the IDEA*, 282 EDUC. L. REP. 785 (2012) (outlining the applicable multi-step test, with case citations illustrating the application of the four successive steps in selected jurisdiction).

⁹ See, e.g., Perry A. Zirkel, *The Competing Approaches for Calculating Compensatory Education Under the IDEA: An Update*, 339 EDUC. L. REP. 10 (2017) (contrasting the quantitative and qualitative approaches and then tracing the D.C. courts' strict application of the *Reid* approach).

¹⁰ *Reid*, 401 F.3d at 522–26.

¹¹ *Id.* at 523. For the contrasting quantitative approach, the *Reid* court primarily cited *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). For its reference to "broad discretion," the *Reid* court cited the Supreme Court's tuition reimbursement ruling in *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993) and its reliance, in turn, on the IDEA's allocation to courts of wide equitable remedial authority, 20 U.S.C. § 1415(i)(2)(C)(iii) ("such relief as the court deems appropriate").

¹² *Reid*, 401 F.3d at 527; see also *id.* at 518 (placing the child "in the same position the child would have occupied but for the school district's [denial of FAPE]"). For the full version, which includes its standard, see *id.* at 524 ("... [T]he 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."). For the relevant factors for the calculus, see *id.* at 527 ("... [S]pecific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits").

officer’s] awarded amount of compensatory education.”¹³ However, the court’s rationale appeared to clearly extend to a hearing officer’s delegation of the entire calculation to the IEP team, because its basis was IDEA’s impartiality requirement that prohibits a school district employee from performing the functions of a hearing officer.¹⁴ Inasmuch as the IEP must include a district representative, the court concluded: “Under the statute, the hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer’s functions.”¹⁵

The U.S. Court of Appeals for the Sixth Circuit subsequently adopted both the qualitative and non-delegation prongs of *Reid*.¹⁶ Other courts have recited *Reid*, usually without its specific formula or only in its abbreviated form,¹⁷ in arriving at a relaxed¹⁸ or hybrid¹⁹ approach. An overlapping cluster of courts have applied *Reid*’s delegation proscription with varying degrees of rigor but with none of them allowing delegating to the IEP team the full determination of whether and how much compensatory education the child should receive.²⁰

At this stage, with the one-year anniversary of the pandemic recently

¹³ *Id.* at 527.

¹⁴ 20 U.S.C. § 1415(f)(3)(A) (“A hearing officer . . . shall, at a minimum, not be an employee of . . . the local education agency involved in the education . . . of the child . . .”).

¹⁵ *Reid*, 401 F.3d at 526.

¹⁶ *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 316–18 (6th Cir. 2007). Extending the non-delegation approach farther, the Tenth Circuit applied it to placement decisions. *M.S. v. Utah Sch. for the Deaf*, 822 F.3d 1128, 1135 (10th Cir. 2016).

¹⁷ *Supra* note 12 and accompanying text.

¹⁸ “Relaxed” refers to cases that do not specify a particular formula for the calculation. *E.g.*, *Draper v. Atlanta Indep. Sch. Dist.*, 518 F.3d 1275 (11th Cir. 2008); *Preciado v. Bd. of Educ. of Clovis Mun. Sch.*, 443 F. Supp. 3d 1289 (D.N.M. 2020); *Cupertino Union Sch. Dist. v. K.A.*, 75 F. Supp. 3d 1088 (N.D. Cal. 2014). For a relaxed approach that the Ninth Circuit developed independent of *Reid*, see *Pangerl v. Peoria Unified School District*, 780 F. App’x 505 (9th Cir. 2019); *Parents of Student W. v. Puyallup School District No. 3*, 31 F.3d 1489 (9th Cir. 1994).

¹⁹ “Hybrid” refers to cases that seem to merge both the *Reid* approach and its quantitative counterpart. *E.g.*, *Brandywine Heights Area Sch. Dist. v. B.M.*, 248 F. Supp. 3d 618 (E.D. Pa. 2017); *B.H. v. W. Clermont Bd. of Educ.*, 788 F. Supp. 2d 682 (S.D. Ohio 2011).

²⁰ *Compare Meza v. Bd. of Educ.*, 56 IDELR ¶ 167 (D.N.M. 2011) (interpreting the proscription to apply to the overall determination); *Phillips v. Indep. Sch. Dist. No. 2*, 73 IDELR ¶ 119 (E.D. Okla. 2018) (following *Meza* to prohibit delegation to consultant), *with Mr. I. v. Me. Sch. Admin. Unit No. 55*, 480 F.3d 1 (1st Cir. 2007); *L.M. v. Henry Cnty. Bd. of Educ.*, 76 IDELR ¶ 282 (E.D. Ky. 2020); *T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902 (C.D. Ill. 2012); *Struble v. Fallbrook Union Sch. Dist.*, 56 IDELR ¶ 4 (S.D. Cal. 2011) (interpreting the proscription to allow for limited discretion to IEP team, such as crafting a new FBA). *Cf. Smith v. Cheyenne Mountain Sch. Dist.* 12, 72 IDELR ¶ 173 (D. Colo. 2018); *A.L. v. Chi. Pub. Sch. Dist.*, 57 IDELR ¶ 215 (N.D. Ill. 2011) (finding no discretionary delegation in re-testing procedure); *Haw. Dep’t of Educ. v. Zachary B.*, 52 IDELR ¶ 213 (D. Haw. 2009) (finding consultant’s determination of compensatory education provider as not violating *Reid* prohibition).

behind us and the resumption of full in-person, in-school instruction looming large, the most significant interpretations of the federal guidance of compensatory services and the recognized remedy of compensatory education are (a) the COVID-19 guidance issued by state education agencies, and (b) the decisional activity of the dispute resolution mechanisms under the IDEA. The Biden Administration’s Coronavirus relief package contributes to both alleviating the pressing resource demands and accentuating the legal issues in the increasing imminence of these two overlapping compensatory measures in the COVID-19 context.²¹

The conceptualization and implementation, including criteria and procedures, for compensatory services are subject to confusion. Semantics contribute to this confusion. First, the federal guidance used “compensatory services” in an apparent attempt to distinguish the remedy of “compensatory education.” However, previous to this guidance both ED and the courts have used these two terms interchangeably as labels for the traditional remedy.²² Second, the follow-up state guidance uses a wide variety of terms

²¹American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 2001, 2004, 2014, 135 Stat. 4, 19–27, 29 (2021). This legislation requires each school district to allocate at least 20 percent of its share of the funding “to address learning loss through the implementation of evidence-based interventions . . . that . . . respond to students’ academic, social, and emotional needs and address the disproportionate impact of the coronavirus on the [ESSA] student subgroups,” which include students with disabilities. *Id.* § 2001(e)(1). It also increases the appropriations for the IDEA. *Id.* § 2014. In the wake of this legislation, a broad coalition that includes disability advocates and teacher unions has filed a request for guidance from ED, seeking to reinforce the use of these funds for recovery measures such as compensatory services for students with disabilities. Michelle Diamant, *Ed Department Urged to Direct More COVID-19 Relief Funds to Students with Disabilities*, DISABILITY SCOOP (Mar. 26, 2021), <https://www.disabilitycoop.com/2021/03/26/ed-department-urged-to-direct-more-covid-19-relief-funds-to-students-with-disabilities/29259> [<https://perma.cc/2JHL-LSWU>].

²²The only reference in the IDEA regulations is the identification of “compensatory services” as an example of a remedy for denial of FAPE in the context of the state complaint procedures. 34 C.F.R. § 300.151(b)(1) (2019). The commentary accompanying the regulations use both terms interchangeably in referring to this remedy for both decisional dispute resolution mechanisms—state complaint procedures and due process hearings. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46539, 46602, 46605–46606, 46655, 46657, 46697 (Aug. 14, 2006). The agency’s other policy interpretations have also used both terms interchangeably in reference to the FAPE-denial remedy. *E.g.*, Letter to Anonymous, 75 IDELR ¶ 162 (OSEP 2019); Letter to Zirkel, 74 IDELR ¶ 171 (OSEP 2019); Letter to Lipsett, 72 IDELR ¶ 102 (OSEP 2018). Similarly, the court have used these terms, and their combination “compensatory education services,” without any differentiation in the development and application of this remedy. *See, e.g.*, *Draper*, 518 F.3d at 1280, 1283 (“compensatory education” and “compensatory services”); *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1079, 1084 (8th Cir. 2020); *L.M. v. Bd. of Educ. of Fayette Cnty.*, 478 F.3d 307, 317 (6th Cir. 2007); *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1031, 1034 (9th Cir. 2006); *Reid v. Dist. of Columbia*, 401 F.3d 516, 518, 520–21 (D.C. Cir. 2005) (“compensatory services,” “compensatory education” and “compensatory education services”); *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 186, 188 (1st Cir. 1993) (“compensatory education,” “compensatory

in place of the federal agency's reference "compensatory services," with inconsistent and often confusing contrast with the FAPE-denial remedy of "compensatory education."²³ In addition to the semantics, another reason for the widespread confusion and questions is the largely unprecedented nature of this systemic IEP-team procedure that ED has prescribed without criteria or other operational details.²⁴ The question to be answered is what are the "applicable standards and requirements"²⁵

To engender careful and clearer consideration of the alternative answers, with due differentiation, of these overlapping compensatory measures, this article provides a systematic comparison in two successive parts. Part I provides a synthesis of the state guidance and decisional activity to date. Part II provides a discussion of some of the likely questions and tentative answers arising from their intersection. For this purpose, the following two acronyms hereinafter serve as abbreviated placeholders, even though the terms they represent are often not semantically consistent or distinctive²⁶: *CS* = *compensatory services* and *CE* = *compensatory education*.

services," and "compensatory educational services"); *Miener v. Missouri*, 800 F.2d 74, 752 (8th Cir. 1986) ("compensatory education services" and "compensatory education").

²³ See *infra* notes 33–35, 39–50 and accompanying text.

²⁴ ED and its Office of Special Education Programs ("OSEP") have recommended this proactive procedure for previous systemic interruptions of services, although alternatively referring to it as "compensatory services" or "compensatory education." *E.g.*, ED, NON-REGULATORY GUIDANCE ON FLEXIBILITY AND WAIVERS FOR GRANTEES AND PROGRAM PARTICIPANTS IMPACTED BY FEDERALLY DECLARED DISASTERS (2017), <https://safesupportivelearning.ed.gov/sites/default/files/disaster-guidance.pdf> [<https://perma.cc/GPD5-THZ6>] (federally-declared disasters); Letter to Pergament, 62 IDELR ¶ 212 (OSEP 2013), <https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/12-023414-il-pergament-makeup.pdf> [<https://perma.cc/WM96-VRFU>] (teacher strikes); ED, QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING AN H1N1 OUTBREAK (2009), <https://www2.ed.gov/policy/speced/guid/idea/h1n1-idea-qa.pdf> [<https://perma.cc/26D5-6A8J>] (swine flu). Moreover, in response to an ED finding of statewide noncompliance with the IDEA's child find requirements, Texas's corrective action plan prominently included CS, with related guidance and support. TEX. EDUC. AGENCY, SPECIAL EDUCATION STRATEGIC PLAN 14–15 (Apr. 2018), <https://tea.texas.gov/academics/special-student-populations/special-education> [<https://perma.cc/ZR6F-5UC2>]. However, the resulting implementation, including the criteria, for the analog to ED's COVID-19 provision for compensatory services has been notably limited and unclear. See, *e.g.*, Marie D. De Jesus, *Lost Time*, HOUS. CHRON. (May 7, 2020), <https://www.houstonchronicle.com/news/investigations/article/federal-law-students-denied-special-education-15253514.php> [<https://perma.cc/BB25-4Q43>] (reporting that less than 8 percent of the eligible students received any compensatory services and that school districts had received confusing guidance). Thus, these various predecessors do not provide specific standards or procedures for the current ED guidance.

²⁵ See *supra* text accompanying note 5.

²⁶ *Id.*; see also *supra* note 23 and accompanying text.

II. COVID-19 INTERPRETATIONS

A. STATE GUIDANCE

A small but increasing number of states have addressed CS in their COVID-19 guidance in the wake of ED’s aforementioned guidance. The majority of these states primarily use a regression-recoupment approach analogous to the multiple factors and sources associated with extended school year (“ESY”) determinations.²⁷ The guidance documents range from brief overviews to rather detailed and comprehensive interpretations. Moreover, they are subject to change as state education agencies receive more information and make updated choices.

On the brief side, for example, Pennsylvania recommends a regression-recoupment approach for CS, which includes a recoupment period “no later than the end of the third month of school resuming normal operations” and multiple factors and sources, such as “[t]he amount of skill and/or behavior loss and/or lack of progress the student experienced while the [school districts] were using alternative learning models due to the COVID-19 pandemic” and “[h]istorical data regarding the student’s ability to recoup lost skills and/or behavior.”²⁸

More detailed guidance specific to students with disabilities tend to address various implementation issues for CS, with varying and sometimes conflicting interpretations. For example, distinguishing “recovery support” for all students and “new IEP services” for students with disabilities, Massachusetts’s guidance for CS consideration includes (a) prioritization of two groups of students with IEPs—those “who did not receive or were unable to access any special education services during the suspension of in-person education” and those “with significant and complex needs”; (b) an intervening period for “initial observation, . . . re-acclimation to learning, and a review of data on recovery of learning loss and progress”; (c) a regression-recoupment approach, but distinguishing CS from ESY as based on past pandemic impact rather than predicted summer impact; and (d) a

²⁷ See, e.g., *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1027 (10th Cir. 1990) (identifying regression-recoupment and additional factors for IEP team determinations of ESY); see also Allan G. Osborne, *When Must a School District Provide an Extended School Year Program to Students with Disabilities?*, 99 EDUC. L. REP. 1, 4–6 (1995) (explaining regression-recoupment and the additional factors in the case law and in some state laws).

²⁸ PA. DEP’T OF EDUC., GUIDANCE AND ANSWERS TO FAQs ON COVID-19 COMPENSATORY SERVICES (Oct. 14, 2020), <https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx> [<https://perma.cc/MC95-6EC3>]. This approach partially overlaps with the factors and sources for the IEP team’s specified in Pennsylvania’s regulations for IEP team determinations of ESY. 22 PA. ADMIN. CODE § 14.132 (2021).

parent-district alternative, agreed upon in writing, to the full IEP team for this determination.²⁹ The Michigan guidance also primarily recommends a regression-recoupment approach for CS, with the same actual past-predictive differentiation from ESY as in Massachusetts, but adding its interpretations that CS (a) must supplement rather than supplant the child's regular instruction but may be delivered during the school day; (b) should be determined as soon as possible but within four months from the full resumption of in-school instruction; and (c) is not an entitlement or requirement under the IDEA and, thus, is not within the jurisdiction of its decisional dispute resolution mechanisms.³⁰ Virginia's CS guidance also uses a regression-recoupment approach, while suggesting that (a) IEP team determinations for CS apply only upon reasonable suspicion of the requisite need; (b) IEP teams document CS services in the IEP (with implementation details including the end date); and (c) CS, unlike CE, is "not the result of a dispute, but rather is a collaborative effort."³¹ Similarly starting with a primarily regression-recoupment multi-factor test for CS, West Virginia's guidance adds not only the common interpretations that the extent of CS need not be minute-for-minute and its delivery is not at all limited to the school day or school personnel³² but also the more questionable interpretation that the IEP team's calculation is subject to the state complaint procedures and due process hearing decisional processes.³³ Moreover, its explanation of the difference between CS and CE has the inadvertently confusing heading of "COVID-19 Recovery Services versus Compensatory Services Due to Emergency School Closures."³⁴

²⁹ MASS. DEP'T OF EDUC., CORONAVIRUS (COVID-19) SPECIAL EDUCATION TECHNICAL ASSISTANCE ADVISORY 2021-1: COVID-19 COMPENSATORY SERVICES AND RECOVERY SUPPORT FOR STUDENTS WITH IEPs (Sept. 3, 2020), <https://www.doe.mass.edu/covid19/sped.html> [<https://perma.cc/YVK3-3WYF>].

³⁰ MICH. DEP'T OF EDUC., GUIDANCE TO ADDRESS FOREGONE LEARNING FOR STUDENTS WITH IEPs AS A RESULT OF THE COVID-10 PANDEMIC (July 7, 2020), https://www.michigan.gov/documents/mde/RecoveryServices_695362_7.pdf [<https://perma.cc/E9E5-NTVW>]. The reference CS during the school day needs clarification to show how it fits with the non-supplanting directive.

³¹ VA. DEP'T OF EDUC., CONSIDERATIONS FOR COVID RECOVERY SERVICES FOR STUDENTS WITH DISABILITIES (July 28, 2020), https://www.doe.virginia.gov/special_ed [<https://perma.cc/VC79-EHF4>].

³² W. VA. DEP'T OF EDUC., COVID-19 RECOVERY SERVICES VERSUS COMPENSATORY SERVICES, at *2, *4 (July 24, 2020), <https://wvde.us/wp-content/uploads/2020/08/21028-CompensatoryServiceBrochure-v2-1.pdf> [<https://perma.cc/28XE-N377>].

³³ *Id.* at *5.

³⁴ *Id.* at *1. The first term is appropriately distinctive for CS, but the second term problematically uses the federal guidance's term "compensatory services" for CE. Additionally, the explanation under this heading seems to suggest that CE is limited to individual cases in which "no special

Additionally, Delaware illustrates the intersecting provision of pertinent guidance for not only students with disabilities but also students generally. More specifically, the guidance in relation to students with disabilities includes IEP team individualized determination and documentation of CS based on variety of factors, including but not limited to regression and recoupment, for the purpose of “act[ing] proactively to address unfinished learning in order to avoid a future denial of FAPE” and with due differentiation from ESY and “traditional compensatory education.”³⁵ The tandem guidance for all students shifts the focus from “learning loss” to “unfinished learning” and from “remediation” to “acceleration,” recommending for this purpose “creat[ing] support structures . . . [that include] summer learning acceleration, extended school day/year, [and] high-dosage tutoring.”³⁶

Using different language, Iowa’s guidance provides a practical procedure and an ultimate limitation of a straightforward regression-recoupment approach. First, contrary to the federal guidance for CS, Iowa’s four-step approach only triggers IEP teams to consider CS “when services provided through the IEP are not sufficient to recoup lost skills or regain progress.”³⁷ Second, the steps compare the child’s levels at the outset and the end of the pandemic, with the determination of CS calculated on a qualitative basis to close the gap in addition to the current IEP services if the post-pandemic level is lower than the pre-pandemic level.³⁸ Thus, like ESY, this approach is designed to restore the last level before the interruption but, unlike ESY, is for a much lengthier period that normally

education or related services were considered, attempted or offered” rather than denial of FAPE more broadly and commonly in COVID-19 contexts. *Id.*

³⁵ DEL. DEP’T OF EDUC., RECOVERY EFFORTS AND THE PROVISION OF FAPE FOR STUDENTS WITH DISABILITIES DURING THE RE-OPENING OF SCHOOLS FROM COVID-19, at 2–5 (July 9, 2020), <https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/600/7-9-20%20FINAL%20Successful%20Launch%20to%20the%20New%20School%20Year.pdf> [https://perma.cc/BRG6-BGWC]. However, the use of “unfinished learning,” which its tandem guidance associates with acceleration, unclearly fits with its regression-recoupment criteria for CS, and the hybrid term “recovery services/compensatory education” seems to contribute to similar confusion with so-called “traditional” CE. *Id.* at 5.

³⁶ DEL. DEP’T OF EDUC., DELAWARE STRATEGY TO ACCELERATE (Mar. 2021), http://education.delaware.gov/wp-content/uploads/2021/03/dde_strategy_to_accelerate_learning.pdf [https://perma.cc/9SZJ-HRVT].

³⁷ IOWA DEP’T OF EDUC., COVID-19 RECOVERY SERVICES FOR LEARNERS RECEIVING IDEA SERVICES FREQUENTLY ASKED QUESTIONS (FAQS), at Q6 (Oct. 13, 2020), <https://educateiowa.gov/sites/files/ed/documents/COVID-19%20Recovery%20Services%20for%20Learners%20Receiving%20IDEA%20Services%20FAQ.pdf> [https://perma.cc/N74E-A76U].

³⁸ *Id.* at Q3, Q8.

would not have been an interruption.³⁹ The remaining recommendations of the Iowa guidance for CS include documentation in the IEP, provision “before or after school, on days the student is not typically in school, or in the summer, as needed by the individual,” and completion within one year.⁴⁰

Finally, illustrating what appears to be a minority approach, a cluster of states have issued guidance that appears to compound confusion by having IEP teams address both CS and CE, thereby changing the traditional meaning of CE and adding FAPE-denial considerations without clear differentiation. The primary example is the evolving Vermont guidance. In its initial version, Vermont differentiated CS and CE but did so unclearly by having district IEP teams determine and address both of them, thus implicating FAPE-based criteria.⁴¹ Subsequently, recognizing the confusion, Vermont issued a purported clarification that repeats its two-sided recommendation for IEP teams but in a way that seems to increase the CE side and subsume the CS side.⁴² First, the revised guidance reiterates the original version’s recommendation to consider CE upon the IEP’s determination that “the LEA’s offer was not appropriate for the student.”⁴³ Next, the guidance revises the recommended result for the determination that “the LEA’s offer of FAPE was effective and accessible by the student, but the student was not able to make progress on IEP goals or demonstrates

³⁹ Thus, this approach does not make up for the estimated progress the child would have made during the period if school had been in session after taking into consideration whatever remote or hybrid services the child received during the pandemic period.

⁴⁰ *Id.* at Q4. As a related matter, the guidance opines that “a re-evaluation would be required only if the IEP team determined those data to be insufficient to complete the four-step process to determine COVID-19 Recovery Services.” *Id.* at Q11.

⁴¹ VT. AGENCY OF EDUC., DETERMINING COVID-19 RECOVERY/COMPENSATORY EDUCATION SERVICES (July 28, 2020) (on file with the author). The distinction, upon making IEP teams responsible for both CS and CE, is unclear not only conceptually but also in implementation. For example, this original guidance for CS, which it called “COVID-19 recovery services,” suggests as the basis either regression-recoupment or this internally conflicting alternative “[i]f the LEA’s offer of FAPE was effective and accessible by the student, but the student was not able to make progress on IEP goals.” *Id.* at 2. For the calculus, the guidance further blurs the distinction by recommending for both CS and CE a *Reid*-type “qualitative approach,” described as “an individualized, fact-specific determination based upon what is reasonably necessary to enable the student to make progress towards their IEP goals given the interruption in educational programing, supports and services.” *Id.* at 1. This guidance no longer appears on the agency’s website. *Page Not Found*, VT. AGENCY OF EDUC., https://education.vermont.gov/sites/aoe/files/documents/edu-determining-covid19-recovery-compensatory-education-services_1.pdf [<https://perma.cc/HC76-RQEY>].

⁴² VT. AGENCY OF EDUC., ASSESSING COVID-19 IMPACT ON ELIGIBLE STUDENTS WITH DISABILITIES AS A REQUIREMENT OF FAPE (Sept. 9, 2020), https://education.vermont.gov/sites/aoe/files/documents/edu-assessing-covid19-impact-for-eligible-students-with-disabilities_0.pdf [<https://perma.cc/ZW47-TBRK>].

⁴³ *Id.* at 4.

regression or loss of skills” to appropriate revision of the IEP.⁴⁴ Oddly, this revised version of the guidance does not specifically refer to the original version’s CS label of “COVID-19 recovery services” or its dual recommendation for the qualitative approach,⁴⁵ although it retains the original version’s recommendation for “supplemental services” to address deficits both as a result and not as a result of FAPE denial.⁴⁶ Most recently, Vermont issued a FAQ that succeeded in clarifying that the length of the data-collection period for the regression-recoupment alternative could be as long as a year but in most cases should be a shorter period⁴⁷—though not squarely resolving the question of how its dual approach squares with the Supreme Court’s recent refinement of the substantive standard for FAPE.⁴⁸

Similarly illustrating such an admixture approach, Ohio’s guidance differentiates CS from CE, but extends CE to districts providing it “voluntarily,” that is, independent of the IDEA’s adjudicatory and investigative decisions.⁴⁹ In doing so, this guidance recommends the same not clearly differentiated assortment of criteria, including both denial of FAPE and regression, for both CS and this voluntary variation of CE.⁵⁰ As a final variation, Washington’s guidance similarly recognizes voluntary CE

⁴⁴ *Id.*

⁴⁵ See *supra* note 41.

⁴⁶ See *supra* note 42, at 7–8. The calculus for these supplemental services also retained the original recommendations for “deductions” based on recoupment or unreasonable conduct. *Id.*

⁴⁷ VT. AGENCY OF EDUC., FAQ: CLARIFICATION OF ASSESSING COVID-19 IMPACT GUIDANCE, at 4 (Nov. 3, 2020), <https://education.vermont.gov/sites/aoe/files/documents/edu-special-education-faq-clarification-of-assessing-covid19-impact-guidance.pdf> [<https://perma.cc/3U6C-SMFP>].

⁴⁸ *Id.* at 1–2 (providing a rather global and imprecise answer as to the fit with *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017)). For the holding in *Endrew F.*, see *infra* note 60.

⁴⁹ OHIO DEP’T OF EDUC., STUDENTS WITH DISABILITIES GUIDANCE, at 6 (Mar. 2020), <http://education.ohio.gov/Topics/Reset-and-Restart/Students-with-Disabilities> [<https://perma.cc/56Z7-DMY2>].

⁵⁰ *Id.* More specifically, the eight criteria, posed as questions for the IEP team, include the following: “Did the district provide a FAPE to the student during the ordered school-building closure period?” and “Did the student regress even with a FAPE provided during the ordered school-building closure period?” *Id.* at 5, 7. The guidance inadvertently further fosters confusion by specifying the same questions for both CS and voluntary CE that appear to permit undifferentiated integration in the IEP. For example, these questions include: “Will the [CE or voluntary CE] be included as part of the goals and objectives?” and “Will [each] be reflected within the student’s specially designed instruction?” *Id.* Yet, the following question for both CS and voluntary CE helps clarify that each should not supplant any of the child’s instruction: “Will [each] occur after the typical school day or does the school day include time when the service could be provided without missing other instruction?” *Id.*

and fuses it within the overall umbrella of CS,⁵¹ although using the school day as the determining factor as to whether the services should be included in the IEP.⁵²

B. COVID-19 DECISIONS

The IDEA provides two alternate routes of decisional dispute resolution at the pre-judicial level—the adjudicative avenue of due process hearings and the investigative avenue of state complaint procedures.⁵³ Thus far, judicial rulings specific to IDEA COVID-19 issues have been negligible, partially due to at least initial restrictions to judicial access⁵⁴ and then the courts’ rather ponderous process.⁵⁵

⁵¹ WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, QUESTIONS AND ANSWERS: PROVISION OF SERVICES TO STUDENTS WITH DISABILITIES DURING COVID-19 IN THE 2020-21 SCHOOL YEAR, at 4 n.4 (Jan. 13, 2021), <https://www.k12.wa.us/sites/default/files/public/specialead/pubsdocs/Providing-Services-SWDs-School-Closures-QandA.pdf> [https://perma.cc/NS9D-7LPH] (“The term ‘recovery services,’ as used in this document . . . may describe services need to remedy a denial of FAPE by a district (typically referred to during dispute resolution as ‘compensatory services’), and also to describe additional, supplemental services needed to address gaps in service delivery due to COVID-19 health/safely limitations, of which districts had no control.”).

⁵² *Id.* at 14:

If the recovery services will be in the form of additional services and supports provided during the school day . . . , then the services should be identified in the student’s IEP, including the frequency, location, and duration of those services. If the recovery services will be provided outside of the school day, then the team could document them in the IEP or in a separate document, such as a prior written notice.

⁵³ *See, e.g.*, Perry A. Zirkel, *A Comparison of the IDEA’s Dispute Resolution Processes—Complaint Procedures and Impartial Hearings*, 369 EDUC. L. REP. 550 (2019) (providing a systematic comparison of the similarities and differences between these two IDEA decisional avenues).

⁵⁴ For the investigative route, most jurisdictions provide either no right or a rather limited right for judicial appeal. *E.g., id.* at 562 n.99; *see also* Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures Under the Individuals with Disabilities Education Act*, 368 EDUC. L. REP. 24, 43–44 (2019) (finding that most states do not provide, via state law or case law, for judicial appeal of state complaints decisions). For the adjudicative route, exhaustion generally applies with limited exceptions for direct IDEA claims as well as for those FAPE-based indirect IDEA claims. *See, e.g.*, Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts’ Jurisdiction Under the Individuals with Disabilities Education Act*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 349, 362 (2009) (direct IDEA claims); Perry A. Zirkel, *Post-Fry Exhaustion Under the IDEA*, 381 EDUC. L. REP. 1 (2020) (FAPE-based claims under Section 504 or other legal bases).

⁵⁵ *E.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009) (repeating the observation in *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 371 (1985), that the IDEA’s “review process is ponderous”).

1. Court Decisions

With a slight exception,⁵⁶ the courts have not yet specifically addressed the application of CS or CE in the COVID-19 context. Instead, most of the IDEA COVID-19 rulings have been on threshold adjudicative grounds, such as standing, stay-put, and exhaustion.⁵⁷ However, in the one court case that included a FAPE ruling, the court addressed the aforementioned⁵⁸ ED guidance more generally. In this case, the federal district court in New Mexico first ruled that the parent of a child with specific learning disabilities was entitled to preliminary injunctive relief primarily because her IEP likely violated the IDEA.⁵⁹ Her relief did not extend to CE, being limited to a purely prospective order to amend her IEP to meet the Supreme Court's refined substantive standard for FAPE in *Andrew F. v. Douglas County School District RE-1*.⁶⁰ Next, in a separate ruling two months later, the court declined to defer to the ED's March guidance documents, concluding that they "are unpersuasive, because they lack thoroughness, valid reasoning, and consistency with prior guidance."⁶¹ Although the defendant put this guidance at issue as purportedly limiting their obligations and thus not specifically mentioning CS, the court's more general conclusion potentially leaves in question the adjudicative impact of the guidance's "every efforts" directive for CS. This case is currently on appeal to the Tenth Circuit.

The relevant decisions have been more notable under the two administrative dispute resolution mechanisms under the IDEA.⁶² The limited previous legal literature concerning COVID-19 IDEA issues did not address these decisions at all.⁶³ The likely reason is their general lack of

⁵⁶ See *infra* note 57.

⁵⁷ *E.g.*, *J.T. v. de Blasio*, ___ F. Supp. 3d ___ (S.D.N.Y. 2020) (jurisdiction, exhaustion, stay-put, and exhaustion); *E.M.C. v. Ventura Unified Sch. Dist.*, 78 IDELR ¶ 21 (C.D. Cal. 2020); *E.E. v. Norris Sch. Dist.*, 77 IDELR ¶ 158 (E.D. Cal. 2020); *J.C. v. Fernandez*, 77 IDELR ¶ 15 (D. Guam 2020) (stay-put). In the first case's broad-based dismissal, the court did not address the legal weight of the ED's guidance but mentioned its CS provision in passing dicta, mischaracterizing it as "relief." *J.T. v. de Blasio*, ___ F. Supp. 3d at ___. This case is currently on appeal to the Second Circuit.

⁵⁸ See *supra* notes 4–5 and accompanying text.

⁵⁹ *Hernandez v. Grisham*, ___ F. Supp. 3d ___ (D.N.M. 2020) (*Hernandez I*).

⁶⁰ *Id.* at ___ (citing *Andrew F.*, 137 S. Ct. 988, 999 (2017), which held that the IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances").

⁶¹ *Hernandez v. Grisham*, ___ F. Supp. 3d ___, ___ (D.N.M. 2020) (*Hernandez III*). For this ruling, the court relied on the Supreme Court's jurisprudence starting with *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁶² See *supra* note 53 and accompanying text.

⁶³ *E.g.*, Thomas A. Mayes, *The Long, Cold Shadow of Before: Special Education During and After COVID-19*, 30 S. CAL. REV. L. & SOC. JUST. 89 (2021) (recommending a collaborative and

precedential weight. However, these decisions are significant at this particular juncture in this unprecedented context because (a) the state complaint decisions are an early indicator of the state education agency supervisory and compliance approach to COVID-19 IDEA issues, and (b) the due process hearing decisions are likely to signal the subsequent standards and outcomes of courts in addressing these issues, turning the usual meaning of vertical precedent upside down.⁶⁴

2. State Complaint Procedures Decisions

The state complaint procedures decisions are direct indicators of state education agency interpretations but are only indirectly and partially indicative of judicial determinations.⁶⁵ A plurality of these decisions to date have relied on federal and state regulations without reference to the COVID-19 federal or state guidance.⁶⁶ The remaining decisions followed their own

flexible approach to FAPE during COVID-19 based on core principles and a FAPE-denial basis for CS with a qualitative gap-filling calculus); Allan G. Osborne & Charles J. Russo, *Providing a FAPE During the COVID-19 Pandemic*, 385 EDUC. L. REP. 1, 6 (2021) (canvassing the guidance and a few court decisions along with imprecisely recommending IEP teams to consider “compensatory educational services such as [ESY]” and restrictively for complete failure to deliver special education). Cf. Crystal Grant, *COVID-19 and Systemic Injustice: People and Governance*, 48 FORDHAM URB. L.J. 127, 137–40 (2020) (relying within the section on special education on mass media sources while recommending federal funding for CS and CE).

⁶⁴ The interrelated reasons for this inversion conclusion are (1) the almost complete lack of judicial precedent for this situation (*supra* notes 56–61 and accompanying text), and (2) the high degree of actual, regardless of articulated, judicial deference to hearing officer rulings (e.g., Perry A. Zirkel & Cathy A. Skidmore, *Judicial Appeal of Due Process Hearing Rulings: The Extent and Direction of Decisional Change*, 29 J. DISABILITY POL’Y STUD. 22 (2018) (finding, for a representative sample of court decisions from 1998 to 2016, that 70 percent of the “issue category rulings” had no or only a slight change from the hearing officer level to the final court level)).

⁶⁵ Their limited predictive value of judicial trends is primarily attributable to two interrelated factors. First, is their limited court connection. See *supra* note 54. Second, their decisions standards overlap with but are not the same as those in the adjudicative avenue. For instance, they are not bound by the legislative prescription of a two-step approach for procedural denial of FAPE that applies to IDEA hearing officers. 20 U.S.C. § 1415(f)(3)(E) (2018). Similarly, decisional use of court decisions is also discretionary for them. See *infra* note 69. Cf. Kirstin Hansen & Perry A. Zirkel, *Complaint Procedures Systems Under the IDEA: A State-by-State Survey*, 31 J. SPECIAL EDUC. LEADERSHIP 108, 113 (2018) (reporting survey finding that in almost two thirds of the states these decisions do not usually cite court decisions); Perry A. Zirkel, *The Two Dispute Decisional Processes Under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169, 189 (2017) (finding in a representative sample of state complaints decisions in five active states that court decisions were seldom cited).

⁶⁶ E.g., Metro. Sch. Corp., 121 LRP 9939 (Ind. SEA Feb. 26, 2021); Toledo Pub. Sch., 121 LRP 1495 (Ohio SEA Nov. 27, 2020); Greater Clark Cnty. Schs., 121 LRP 1675 (Ind. SEA Nov. 16, 2020); Porter Twp. Sch. Corp., 120 LRP 29261 (Ind. SEA Aug. 31, 2020); N. Montgomery Cmty. Sch. Corp., 77 IDELR ¶ 144 (Ind. SEA 2020); Beech Grove City Sch. Dist., 120 LRP 24255 (Ind. SEA July 16, 2020).

state guidance⁶⁷ or, more often, cited the March federal guidance but without specifically addressing either its legal force⁶⁸ or its CS provision.⁶⁹ With or without reference to federal or state guidance, relatively few state complaint decisions cited judicial authority.⁷⁰ Moreover, for those complaint procedure decisions that found denials of FAPE and opted for CE relief, they typically did so by delegating the determination to the IEP team,⁷¹ rarely including any criteria for this determination.⁷² Likely because most of the complaint procedures decisions arose before the full resumption of in-school instruction, they hardly ever mentioned CS.⁷³ In the infrequent

⁶⁷ *E.g.*, Douglas Cnty. Sch. Dist. RE-1, 121 LRP 3712 (Colo. SEA Dec. 11, 2020); Worthington Pub. Sch. Dist., 121 LRP 3716 (Minn. SEA Dec. 7, 2020); *In re Student with a Disability*, 77 IDELR ¶ 125 (Kan. SEA 2020).

⁶⁸ Coming the closest, one decision included dicta that “although courts are not bound by agency interpretations of statutes and regulations, they generally give them deferential consideration.” Clark Cnty. Sch. Dist., 121 LRP 1636, at *11 (Nev. SEA Dec. 18, 2020).

⁶⁹ *E.g.*, Sylvania Schs., 78 IDELR ¶ 83 (Ohio SEA 2021); Portland Pub. Sch. Dist. 1J, 78 IDELR ¶ 119 (Or. SEA 2020); S. Washington Cnty. Sch. Dist., 121 LRP 1701 (Minn. SEA Dec. 4, 2020); Roseville Pub. Sch. Dist., 121 LRP 1699 (Minn. SEA Nov. 20, 2020); *In re Student with a Disability*, 77 IDELR ¶ 173 (Wis. SEA 2020); St. Louis Park Pub. Sch. Dist., 78 IDELR ¶ 127 (Minn. SEA 2020); *In re Student with a Disability*, 77 IDELR ¶ 270 (Minn. SEA 2020); El Paso Cnty. Sch. Dist. 11, 77 IDELR ¶ 236 (Colo. SEA 2020); Brookings Sch. Dist., 77 IDELR ¶ 55 (S.D. SEA 2020).

⁷⁰ *E.g.*, *In re Student with a Disability*, 121 LRP 9943 (Me. SEA Feb. 12, 2021); Washoe Cnty. Sch. Dist., 78 IDELR ¶ 52 (Nev. SEA 2021); Portland Pub. Sch. Dist. 1J, 78 IDELR ¶ 119 (Or. SEA 2020); Clark Cnty. Sch. Dist., 121 LRP 1636 (Nev. SEA Dec. 18, 2020); *In re Student with a Disability*, 120 LRP 36828 (N.D. SEA Nov. 10, 2020); El Paso Cnty. Sch. Dist. 11, 77 IDELR ¶ 236 (Colo. SEA 2020).

⁷¹ *E.g.*, E. Howard Sch. Corp., 121 LRP 9941 (Ind. SEA Feb. 26, 2021); *In re Student with a Disability*, 78 IDELR ¶ 116 (Wis. SEA 2021); *In re Student with a Disability*, 78 IDELR ¶ 85 (Mont. SEA 2020); S. Washington Cnty. Sch. Dist., 121 LRP 1701 (Minn. SEA Dec. 4, 2020); Greater Clark Cnty. Sch., 121 LRP 1675 (Ind. SEA Nov. 16, 2020); *In re Student with a Disability*, 77 IDELR ¶ 173 (Wis., 2020); St. Louis Park Pub. Sch. Dist., 78 IDELR ¶ 127 (Minn. SEA 2020); *In re Student with a Disability*, 77 IDELR ¶ 270 (Minn. SEA 2020); Beech Grove City Sch. Dist., 120 LRP 24255 (Ind. SEA July 16, 2020). *Cf. In re Student with a Disability*, 121 LRP 9943 (Me. SEA Feb. 12, 2021) (delegating to IEP team only location and timing of 290 hours of CE); Roseville Pub. Sch. Dist., 121 LRP 1699 (Minn. SEA Nov. 20, 2020) (ordering IEP manager to propose IEP amendment for CE after consulting with parent); Brookings Sch. Dist., 77 IDELR ¶ 55 (S.D. SEA 2020) (delegating to IEP team whether the ordered one day of CE would be delivered remotely or in school). *But see* Sylvania Schs., 121 LRP 6039 (Ohio SEA Jan. 22, 2021); Porter Twp. Sch. Corp., 120 LRP 29261 (Ind. SEA Aug. 31, 2020) (direct minute-for-minute CE order); El Paso Cnty. Sch. Dist. 11, 77 IDELR ¶ 236 (Colo. SEA 2020) (direct CE award per hybrid approach); Bedford City Sch. Dist., 121 LRP 11937 (Ohio SEA Mar. 3, 2021) (direct CE order).

⁷² Metro. Sch. Corp., 121 LRP 9939 (Ind. SEA Feb. 26, 2021) (including, inter alia, the unusual explicit criterion of the child’s capacity to receive CE). *Cf. Washoe Cnty. Sch. Dist.*, 78 IDELR ¶ 52 (Nev. SEA 2021) (direct CE award per hybrid-like approach plus IEP team determination of possible additional amount per regression-recoupment approach).

⁷³ The following dicta appeared in one case: “While not in violation of implementing the IEP due to good faith attempts to provide service, it is recommended the District consider this Student a

cases in which CS played a role, the decisions reflected confusion between CS and CE.⁷⁴ Additionally, in an occasional case the district's voluntary action to remedy deficiencies presaged, by analogy, the likely proactive or offset effect of CS.⁷⁵ Finally, a recent decision addressed the novel issue of whether an IEP team member, who is the district's special education leader, violated the IDEA by suggesting at an IEP meeting that CS be provided to the child during the virtual school day rather than during the subsequent summer.⁷⁶

3. Due Process Hearing Decisions

Based on their direct connection to courts and adherence to the same standards for fact finding and legal conclusions,⁷⁷ due process hearing decisions are the most likely indicator of the eventual judicial precedents for COVID-19 IDEA issues, including the role and contours of CE and CS.⁷⁸ Although not as frequent as state complaint decisions thus far due to

candidate for Recovery Services due to the Student's significant needs and difficulty accessing online lessons." Toledo Pub. Sch., 121 LRP 1495, at *7 (Ohio SEA Nov. 27, 2020).

⁷⁴ Mounds View Pub. Sch. Dist., 121 LRP 13716 (Minn. SEA Feb. 2, 2021) (ordering IEP team to determine CE for implementation failure, citing as seeming support the federal guidance for CS); Sylvania Schs., 78 IDELR ¶ 117 (Ohio SEA 2021) (denying CE and "recovery services" but with definitions that failed to clearly differentiate them); *In re Student with a Disability*, 78 IDELR ¶ 85 (Mont. SEA 2020) (ordering corrective actions for FAPE violations in progress reporting and implementation that included the delegated determination of CE based on the federal guidance for CS).

⁷⁵ *E.g.*, Sylvania Schs., 78 IDELR ¶ 83 (Ohio SEA 2021); *In re Student with a Disability*, 120 LRP 36828 (N.D. SEA Nov. 10, 2020) (finding district's voluntary remedying of implementation shortfall upon notice of it contributed to finding of no material failure to implement the IEP).

⁷⁶ Linn-Mar Cmty. Sch. Dist., 121 LRP (Iowa SEA Mar. 19, 2021). The specific suggestion, which the team did not adopt, was to provide CS at the time that the child's general education peers were receiving asynchronous instruction. The decision was that this action was not a violation, reasoning that "[d]uring an IEP Team meeting, any participant must have the ability to suggest an IEP amendment and allow the suggestion to stand or fall in IEP Team deliberations." *Id.* at *2.

⁷⁷ Because the IDEA largely and, in most cases, entirely provides for fact-finding at the hearing officer level, any applicable differences in administrative rules of evidence are insignificant. *See* 20 U.S.C. § 1415(i)(2) (2018). Moreover, along with the specialized expertise of IDEA hearing officers, *e.g.*, *id.* § 1415(f)(3)(A)(ii), this statutory structure reinforces and focuses customary judicial deference to administrative decisions, *see, e.g.*, Daniel W. Morton-Bentley, *The Rowley Enigma: How Much Weight Is Due to IDEA State Administrative Proceedings in Court*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 428, 462–64 (2016) (advocating a deferential substantial evidence approach to judicial review in according with the Supreme Court's landmark *Rowley* decision).

⁷⁸ *See supra* note 64.

their shorter limitations period and filing-to-completion length,⁷⁹ the due process hearing decisions already show various relevant trends.

First, like the state complaint procedures decisions,⁸⁰ the due process hearing decisions tend to cite the March 2020 ED guidance, sometimes with tandem state guidance, without addressing the issue of whether these agency interpretations are entitled to deference.⁸¹

For CE, these hearing officer decisions frequently cited *Reid v. District of Columbia*⁸² but usually only in supporting a relatively relaxed qualitative or hybrid approach.⁸³ Moreover, these decisions have not provided commensurately wide recognition to its delegation prohibition⁸⁴ even though it is specific to them,⁸⁵ unlike state complaint procedures decisions.⁸⁶

⁷⁹ E.g., Zirkel, *supra* note 53, at 555 & nn.48–51 (identifying sixty-day period with strict extensions compared to seventy-five-day period and more liberal extensions); CTR. FOR APPROPRIATE DISP. RESOL. IN SPECIAL EDUC. [CADRE], IDEA DISPUTE RESOLUTION SUMMARY FOR U.S. AND OUTLYING AREAS 2008–09 TO 2018–19, at 3 (2019), https://www.cadeworks.org/sites/default/files/resources/National%20IDEA%20Dispute%20Resolution%20Data%20Summary%202018-19%20-%20Final%20Accessible_0.pdf [<https://perma.cc/RA6B-KGEU>] (reporting much higher proportions of decisions within the timeline for state complaint procedures than for the corresponding timeline for due process hearings).

⁸⁰ See *supra* note 68 and accompanying text.

⁸¹ E.g., Hutto Indep. Sch. Dist., 121 LRP 13473 (Tex. SEA Mar. 18, 2021); Florence Cnty. Sch. Dist., 121 LRP 10625 (S.C. SEA Feb. 22, 2021); D.C. Pub. Sch., 121 LRP 6870 (D.C. SEA Jan. 11, 2021); *In re Student with a Disability*, 121 LRP 3961 (Nev. SEA Dec. 30, 2020); Clark Cnty. Sch. Dist., 78 IDELR ¶ 86 (Nev. SEA 2020); Shoreline Sch. Dist., 121 LRP 4003 (Wash. SEA Nov. 25, 2020); E. Windsor Bd. of Educ., 121 LRP 2530 (Conn. SEA Nov. 18, 2020); Georgetown Indep. Sch. Dist., 121 LRP 3995 (Tex. SEA Nov. 18, 2020); Norris Sch. Dist., 120 LRP 30203 (Cal. SEA Sept. 2, 2020); Lake Stevens Sch. Dist., 77 IDELR ¶ 207 (Wash. SEA 2020). *But cf.* L.A. Unified Sch. Dist., 77 IDELR ¶ 116, at *4 (Cal. SEA 2020) (citing its disclaimer and concluding that it did not provide a safe harbor from FAPE liability).

⁸² For *Reid*'s relevant rulings, see *supra* notes 10–15 and accompanying text.

⁸³ E.g., Hutto Indep. Sch. Dist., 121 LRP 13473 (Tex. SEA Mar. 18, 2021); Charter Oak Unified Sch. Dist., 121 LRP 12190 (Cal. SEA Mar. 11, 2021); D.C. Pub. Sch., 121 LRP 6870 (D.C. SEA Jan. 11, 2021); Bass Lake Joint Elementary Sch. Dist., 121 LRP 328 (Cal. SEA Dec. 23, 2020); Shoreline Sch. Dist., 121 LRP 4003 (Wash. SEA Nov. 25, 2020); Long Beach Unified Sch. Dist., 120 LRP 33840 (Cal. SEA Oct. 12, 2020); Norris Sch. Dist., 120 LRP 30203 (Cal. SEA Sept. 2, 2020); L.A. Unified Sch. Dist., 77 IDELR ¶ 116 (Cal. SEA 2020)

⁸⁴ E.g., Nashoba Reg'l Sch. Dist., 121 LRP 8486 (Mass. SEA Mar. 3, 2021) (delegating determination to IEP team to extent not already done as CS); Florence Cnty. Sch. Dist., 121 LRP 10625 (S.C. SEA Feb. 22, 2021) (allocating the determination to the IEP team along with substantive revisions to the IEP). For a creative variation that would seem to comply with the delegation prohibition, see D.C. Pub. Schs., 78 IDELR ¶ 84 (D.C. SEA 2020) (delegating CE calculation to an independent educational evaluator at public expense).

⁸⁵ See *supra* note 15 and accompanying text.

⁸⁶ The IDEA regulations only require that these decisions be “independent.” 34 C.F.R. § 300.152(a)(4) (2019). In contrast to the specific statutory standard for impartiality for hearing officers, 20 U.S.C. § 1415(f)(3)(A)(i) (2018), this regulatory requirement does not, as common practice shows, exclude state employees for conducting state complaint procedures functions.

On the relatively rare occasion that these decisions mention CS, it tends to be confused with CE.⁸⁷ Also similar to the state complaint procedures decisions,⁸⁸ an occasional CE decision illustrates, by analogy, the potential equitable-reduction effect of CS.⁸⁹ One recent hearing officer decision provided a direct, rather than analogous, example, considering the district's offer of CS as part of the reason to deny CE.⁹⁰

III. DISCUSSION

Based on the foregoing synthesis of the guidance and decisional law to date specific to CS and CE, this discussion addresses the leading issues from the differentiated dual perspective of legal and practical lenses. Ultimately, the issue of whether and how to implement CS is a school-district decision subject various local considerations, including the evolving incidence and interpretations of the investigative and adjudicative mechanisms of the IDEA. Its benefits of proactive assistance to students with clear pandemic needs, compliance with federal and state guidance, and use of newly available federal funding⁹¹ are obvious. However, its costs include precluding or limiting other competing alternatives for effectively addressing the needs of students with and without disabilities; having a potentially exacerbating rather than preventive effect on the frequency and outcomes of COVID-19 legal activity;⁹² and posing corresponding complications for students with Section 504 plans.⁹³ Ultimately, the

Thus, their frequent use of delegation of CE does not pose the same problem. *See supra* note 71 and accompanying text.

⁸⁷ *E.g.*, Nashoba Reg'l Sch. Dist., 121 LRP 8486 (Mass. SEA Mar. 3, 2021) (using state guidance for CE to support delegation to IEP team for CE determination); L.A. Unified Sch. Dist., 77 IDELR ¶ 116, at *15 (Cal. SEA 2020) (treating CS as a "remedy" in support of its direct CE award); Lake Stevens Sch. Dist., 77 IDELR ¶ 207, at *16 (Wash. SEA 2020) (using ED guidance for CS to support conditional delegated CE award). *Cf. In re Student with a Disability*, 121 LRP 3961 (Nev. SEA Dec. 30, 2020) (reasoning the ED guidance for CS contributed to expectation of CE or related remedy).

⁸⁸ *See supra* notes 74–75 and accompanying text.

⁸⁹ *E.g.*, D.C. Pub. Schs., 121 LRP 11768 (D.C. SEA Feb. 16, 2021) (concluding that the district-authorized services sufficed as CE); Ringwood Bd. of Educ., 120 LRP 36026 (N.J. SEA Nov. 18, 2020) (concluding that the district's voluntary services rendered the remedy of CE moot).

⁹⁰ Not affecting the calculus, the hearing officer mentioned that the parents rejected the CS services based on methodological and safety concerns. *Id.* at *10.

⁹¹ *See supra* note 21.

⁹² Depending on the culture of the particular locality and its implementation of CS, its use may foster escalating expectations, competitive pressures, and—as the foregoing legal analysis amply shows—expensive adversarial proceedings to resolve the many unsettled issues.

⁹³ The ED guidance applies to these students just like those under the IDEA. *See supra* note 5 and accompanying text. Yet, for these students, unlike those with IEPs, districts receive no designated federal or state funding.

appropriate actions with regard to the federal and state guidance for CS will depend on the widely varying resources and values at the local level.⁹⁴

A. THRESHOLD LEGAL CONSIDERATION

The threshold legal consideration is the decisional status of the ED and resulting state guidance specific to CS. This “status” consists of two successive issues—jurisdiction and legal weight. Consider the hypothetical opposite choices of two school districts upon full resumption of school services: (a) the Noway School District does not implement CS, instead focusing on other issues in addressing the needs of its students with disabilities, and (b) the Okay School District implements CS but some of the parents disagree with IEP team determinations of CS for their child. If one or more parents in each district resorts to the state complaint procedures avenue, the likelihood is that the decision will, without addressing jurisdiction,⁹⁵ follow the guidance but it will likely avoid determining the specific extent that any of these children is entitled to CS.⁹⁶ More significantly in terms of legal weight, if parents in either district resort to the adjudicative route directly in court, they face major hurdles, including exhaustion.⁹⁷ If they instead first go to a due process hearing, the jurisdictional issue is a potential deal breaker. Are claims for inadequate application of the ED’s CS guidance, in the absence of a finding of denial of FAPE, within the subject matter jurisdiction boundaries of IDEA

⁹⁴ For the wide variance in school district budgetary resources as a result of the pandemic, see Mark Lieberman, *School Budgets: Why They’re Not as Bad as Predicted*, EDUC. WK., Mar. 31, 2021, at 30 (reporting the resulting variation in revenue and enrollments and the still-to-be seen effect of the latest round of federal funding).

⁹⁵ If the application of the CS guidance is the sole issue, it is at least potentially arguable whether this guidance alone fits within the jurisdictional prerequisite of “a requirement of Part B of the Act.” 34 C.F.R. § 300.153(b)(1) (2019). However, most state complaints contain multiple issues and are devoid of the nuanced jurisdictional and other “technical” issues associated with the vigorous legal advocacy associated with the adjudicative process. See, e.g., Zirkel, *supra* note 65, at 181–82.

⁹⁶ In general, state complaint procedures decisions are oriented to procedural rather than substantive determinations. See, e.g., Zirkel, *supra* note 65, at 181–82. In response to questions concerning the trend for the eligibility and FAPE issues, the federal guidance has clearly countered with the interpretation that the substantive sides of these issues are within the jurisdiction of this investigative avenue. OSEP, DISPUTE RESOLUTION PROCEDURES UNDER PART B OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, at B-6, B-8, as reprinted in 61 IDELR ¶ 232 (OSEP 2013). However, this guidance has been less expansive with regard to the specific legal standards and remedial authority for these substantive determinations. See, e.g., *id.* at B-6 (“If the SEA determines that the public agency’s eligibility determination is not supported by the child-specific facts, the SEA can order the public agency, on a case-by-case basis, to reconsider the eligibility determination in light of those facts”).

⁹⁷ See *supra* notes 54, 57.

adjudication?⁹⁸ Next, if the answer is yes, what is the extent, if any, of the legal persuasiveness of this guidance?⁹⁹ Thus, an initial legal consideration, which is too easily neglected,¹⁰⁰ is the role of the CS guidance for the illustrative hypotheticals of the Noway and Okay school districts.

B. OVERALL CONSIDERATIONS AND RECOMMENDATIONS

For districts that regardless of the threshold legal issues choose to implement the CS guidance and for states that are amenable to issuing new guidance documents, various other considerations and recommendations warrant careful attention. The following table serves as a framework that reviews the foregoing synthesis with entries that are this Author's tentative recommendations. The limited exceptions are those descriptive, rather than prescriptive, CS or CE entries designated with a question mark, because these items are particularly unsettled issues for policymakers and stakeholders alike.

⁹⁸ 34 C.F.R. § 300.507(a) (2019) (“relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child”).

⁹⁹ See *supra* note 61. For pre-COVID-19 case law, see Perry Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 EDUC. L. REP. 671, 675 (2017) (finding that courts rejected the persuasiveness of IDEA agency guidance in approximately one sixth of the cases that directly addressed this issue). For the current context, the most recent Supreme Court decision raised the narrowing question for applying deference, which here is where is the prerequisite “genuine ambiguity” in the IDEA regulations. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15 (2019).

¹⁰⁰ The limited exceptions are split and without explanatory support. See *supra* notes 30, 33 and accompanying text.

Table: Framework Comparison of CS and CE

	CS	CE
Label (Consistent Terminology)	distinctive and pandemic-specific – e.g., COVID-19 recovery services	compensatory education – or variation thereof ¹⁰¹
Nature (From–To)	internally proactive – many students	third-party ¹⁰² remedy – few students
Approach (Triggering Basis)	regression-recoupment? ¹⁰³	denial of FAPE ¹⁰⁴
Approach (Resulting Calculation)	gap-closing? ¹⁰⁵	relaxed qualitative or hybrid ¹⁰⁶

The first row of the table is intended to eliminate or at least substantially eliminate the current confusion in the state guidance¹⁰⁷ and administrative law¹⁰⁸ to date that started with the unfortunate and inadvertent use of “compensatory services” in the originating federal guidance.¹⁰⁹ Thus, the recommendation is to use terminology for CS that

¹⁰¹ The variations for CE are “compensatory services” and “compensatory education services.” See *supra* note 22.

¹⁰² The decisional third-party is either via the adjudicative avenue (hearing officer or court) or the investigative avenue (state complaint procedures or OCR).

¹⁰³ The question mark is because although this approach is prevailing at this evolving point in state guidance (*supra* notes 28–40 and accompanying text), it is subject to change as a policy matter upon closer consideration.

¹⁰⁴ *E.g.*, *M.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 396 (3d Cir. 1996) (ruling that compensatory education accrues upon more than a de minimis denial of FAPE). *Cf.* *N.W. v. Boone Cnty. Bd. of Educ.*, 763 F.3d 611, 616 (6th Cir. 2014) (ruling that the reimbursement remedy does not apply in the absence of denial of FAPE). However, for state complaints the denial of FAPE does not necessarily require substantive student harm, *e.g.*, *Indep. Sch. Dist. No. 221 v. Minn. Dep’t of Educ.*, 48 IDELR ¶ 222, at *8 (Minn. Ct. App. 2007) or the second step for adjudicative procedural denials, *supra* note 65.

¹⁰⁵ Most state guidance for CS do not specifically address this issue, but Iowa does so with this gap-closing approach. See *supra* note 38 and accompanying text. Illustrating both the alternatives of a vague FAPE-based approach or a strict qualitative approach, Vermont’s original guidance reflects the open question. See *supra* note 41.

¹⁰⁶ See *supra* note 83 and accompanying text. This rather relaxed and flexible approach is increasingly prevailing more generally. See Zirkel, *supra* note 6, at 856–57; Zirkel, *supra* note 9, at 12.

¹⁰⁷ See *supra* notes 22–23 and accompanying text.

¹⁰⁸ See *supra* notes 74, 87 and accompanying text. For limited court confusion regarding CS, see *supra* note 57.

¹⁰⁹ See *supra* note 5 and accompanying text.

consistently and clearly differentiates it from CE to avoid confusion and conflation.

Conversely, the second row is intended to maintain the traditional limitation of CE to investigative or adjudicatory decisions as a remedy for denial of FAPE. Although the edges are subject to occasional blurring by district's anticipatory provisions of services during these formal administrative proceedings on a one-sided or settlement basis, having IEP teams responsible systemically for CE in the wake of COVID-19 unduly fuses the criteria and calculus for these two compensatory measures. Such dual implementation also entails the team's extra difficulties of the extra but temporary measures of CS and CE from its revisions to the IEP, which should be part and parcel of the full resumption of in-person, in-school instruction and, depending on the child, may include ESY.

The third row raises the question of whether the regression-recoupment approach, with or without related criteria, is not only sufficiently differentiated from ESY for IEP teams' effective implementation but also clearly understood not to reach the overlapping but separable issue of FAPE. As the Iowa gap-filling approach illustrates,¹¹⁰ regression-recoupment is designed to maintain the child's level of progress from before a break. The first significant difference is that the break for ESY is typically two or three months that would otherwise be without any services, whereas for COVID-19 the break is typically a year or more, albeit with varying degrees of service. The second and interrelated distinction is that FAPE would require in most cases, as a result of either the *Andrew F.* standard for substantive FAPE¹¹¹ or the corresponding standard for FAPE implementation,¹¹² progress beyond merely restoring the pre-pandemic baseline. In such cases, the provision CS via regression-recoupment would not prevent a third-party determination of denial of FAPE. On balance, unless a more effective approach emerges, regression-recoupment with supplementary factors, like for ESY but differentially customized for the COVID-19 context, would appear to be more workable for IEP teams than a FAPE-based approach. However, choosing it must include the

¹¹⁰ See *supra* note 39 and accompanying text.

¹¹¹ See *supra* note 60.

¹¹² As the due process hearing decisions in the COVID-19 context have already shown, the prevailing standard is the materiality approach of *Van Duyn ex rel. Van Duyn v. Baker School District 5J*, 502 F.3d 811 (9th Cir. 2007). *E.g.*, Nashoba Reg'l Sch. Dist., 121 LRP 8486 (Mass. SEA Mar. 3, 2021); Clark Cnty. Sch. Dist., 121 LRP 1636 (Nev. SEA Dec. 18, 2020); Watertown Bd. of Educ., 77 IDELR ¶ 298 (Conn. SEA 2020); Norris Sch. Dist., 120 LRP 30203 (Cal. SEA Sept. 2, 2020); L.A. Unified Sch. Dist., 77 IDELR ¶ 116 (Cal. SEA 2020). The few state complaint procedures decisions that cited case law reinforced the leading position of *Van Duyn*. *E.g.*, *In re Student with a Disability*, 121 LRP 9943 (Me. SEA Feb. 12, 2021); Washoe Cnty. Sch. Dist., 78 IDELR ¶ 52 (Nev. SEA 2021); El Paso Cnty. Sch. Dist. 11, 77 IDELR ¶ 236 (Colo. SEA 2020).

understanding that it does not automatically or even likely equate to CE if the parent resorts to the decisional dispute resolution mechanisms and the decision is denial of FAPE and this remedy is part of the relief.

Similarly and on an overlapping basis, the fourth row shows that the open question of the criteria for calculating CS may or may not square with the corresponding calculus for CE, if the parent files a COVID-19 FAPE claim and a state complaint procedures or due process hearing decision rules in favor of this remedy.

C. MISCELLANEOUS OTHER TENTATIVE RECOMMENDATIONS

These various remaining recommendations are tentative, personal suggestions that are subject to local discretion. Thus, the “should” for each one should not be confused with legal conclusions or even consensus best practice, particularly due to the unprecedented and evolving context for CS. Moreover, the point of full resumption of in-school services is still subject to substantial variance in not only infection and vaccination rates but also district and parent choices.¹¹³

The first pair of steps is for the child’s teachers to (a) ascertain as soon as possible the child’s then present educational levels,¹¹⁴ which aligns with inferable best practice for IEP team meetings upon the post-pandemic resumption of full services, and (b) estimate, based on available recorded data and professional recollections, the child’s corresponding levels at the outset of the pandemic upon the schools’ closure. These respective baselines will be significant factors for determining (a) which children should have priority, by way of analogy to a child find “reasonable suspicion” criterion,¹¹⁵ for IEP team determinations of whether the child needs CS¹¹⁶ and, if so, (b) for application of whatever approach is chosen to determine the amount and nature of the CS.

Second, the IEP team should carefully differentiate and coordinate CS with (a) recovery services for all students and (b) both ESY and new IEP

¹¹³ See, e.g., Stephen Sawchuk & Sarah D. Sparks, *Feds’ First Survey of Pandemic Learning Finds Nearly Half of Students Taught Remotely*, EDUC. WK., Mar. 31, 2021, at 14 (reporting ED survey finding that 47 percent of grade 4 students and 46 percent of grade 8 students had the option of full in-person teaching and 38 percent and 28 percent respectively were doing so).

¹¹⁴ Although more immediate and informal in this recommendation, ultimately this information will be part of the more specific “present levels of academic achievement and functional performance” in the IEP. 34 C.F.R. § 300.320(a)(1) (2019).

¹¹⁵ See, e.g., Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility Under the IDEA*, 357 EDUC. L. REP. 30, 30–31 (2018) (identifying the three-part analysis for child find starting with the triggering component of reasonable suspicion).

¹¹⁶ For an illustration in state guidance, see *supra* note 31 (Virginia).

services for the particular student.¹¹⁷

The third recommendation is made relatively clear in a few of the aforementioned state guidance documents¹¹⁸ but bears emphasis in light of school districts' institutional inclination to focus on the school day. Specifically, CS, like CE, should supplement, not supplant, the child's regular instructional activities, which are not at all limited to the IEP-specified specially designed instruction and related services.

Fourth, although as a practical matter the specification of the child's CS should be documented and available to the parents and the affected personnel, if this documentation is within the IEP,¹¹⁹ it should be carefully separated from the other services in the IEP with its own designated limited duration and non-supplanting timing. The designations should otherwise follow, at least by analogy, the IEP requirements for specifying the anticipated frequency and location.¹²⁰

Finally, in the criteria for calculating the amount, timing, and duration of CS, consider whether it would be appropriate to specify the saturation factor of diminishing or negative returns, which has only rarely been recognized for CS¹²¹ or even CE.¹²²

¹¹⁷ See *supra* notes 29 (Massachusetts), 30 (Michigan) and, at least in part, 35–36 (Delaware) and accompanying text.

¹¹⁸ See *supra* notes 30 (Michigan), 40 (Iowa), and 52 (Washington) and accompanying text.

¹¹⁹ For this general approach, see *supra* notes 31 (Virginia) and 40 (Iowa) and accompanying text.

¹²⁰ 34 C.F.R. § 300.320(a)(7) (2019).

¹²¹ TEX. EDUC. AGENCY, CONSIDERATIONS FOR EXTENDED SCHOOL YEAR AND COMPENSATORY SERVICES FOR STUDENTS WITH DISABILITIES DURING AND AFTER SCHOOL CLOSURES DUE TO COVID-19, at 3 (May 2020), <https://tea.texas.gov/sites/default/files/covid/covid19-compensatory-services-and-extended-school-year-guidance.pdf> [<https://perma.cc/42AC-72YA>] (“[IEP teams] should keep the student and the family in mind when determining the duration and frequency of compensatory services. Overloading a student with compensatory services may ultimately do more harm than good.”).

¹²² Metro. Sch. Corp., 121 LRP 9939, at *4 (Ind. SEA Feb. 26, 2021) (specifying in the delegation of the CE determination various considerations for the IEP team including the following: “What is the student’s capacity to receive [CE] hours, considering the age of the student, the severity of the disability, the cognitive and/or attentional ability, the physical/mental stamina to receive additional instruction outside of the school day, and other mitigating factors”).