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A Free Appropriate Public Education: Examining What "Appropriate" Means for Students with Disabilities in a Global Pandemic

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A Free Appropriate Public Education: Examining What “Appropriate” Means for Students with Disabilities in a Global Pandemic

Bailey Kadian[†]

CONTENTS

CONTENTS	557
INTRODUCTION	558
I. LEARNING LOSS	562
A. <i>Summer Learning Loss as a Framework</i>	565
B. <i>The “COVID Slide”</i>	566
C. <i>Students with Disabilities Experience Learning Loss at a Higher Rate</i>	571
II. THE IDEA’S SILENCE AND STATES’ RESPONSES TO COVID-19 DISRUPTIONS	574
A. <i>The IDEA: A Closer Look at its Purpose</i>	574
B. <i>Compensatory Education: An Overview</i>	574
C. <i>Federal Responses to COVID-19 Closures</i>	576
D. <i>State COVID-19 Responses</i>	578
III. COURTS DEFINING A FAPE.....	584
A. <i>The Supreme Court’s Definition of a FAPE</i>	584
B. <i>FAPE in the COVID-19 Context</i>	586
IV. RECOMMENDATIONS.....	589
A. <i>New Language in the IDEA</i>	590
B. <i>Shifting Blame and Funds Distribution</i>	591
C. <i>Expedite the Process for Granting Compensatory Education Awards</i>	592
CONCLUSION	594

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INTRODUCTION

Some parents describe remote learning for students with disabilities as an “absolute nightmare.”¹ Others have called it a “disaster.”² Many parents have felt “consistently and completely overwhelmed.”³ The COVID-19 pandemic acts as the driving force behind this unprecedented disruption to education. These parents’ statements detailing the depth of their worry offer only a few examples of the many attempts that parents have made to put words to such challenging daily experiences.

COVID-19 has posed substantial limitations on what schools are able to provide for all students during long-term remote learning. Learning loss for students in primary and secondary education is of great concern. Educators, school administrators and districts all fear the devastating consequences and long-term costs associated with learning loss.⁴ Most students have experienced some form of regression, though the degree varies

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1. Melissa Frick, *Virtual Learning a ‘Nightmare’ for Special Education Students Amid Pandemic, Parents Say*, MLIVE (Jan. 3, 2021), <https://www.mlive.com/news/2021/01/virtual-learning-a-nightmare-for-special-education-students-amid-pandemic-parents-say.html> [https://perma.cc/H7JQ-LT8Q]; Linda Jacobson, *Parents (and Lawyers) Say Distance Learning Failed Too Many Special Education Students. As Fall Approaches, Families Wonder If Their Children Will Lose Another School Year*, THE74 (July 29, 2020), <https://www.the74million.org/article/parents-and-lawyers-say-distance-learning-failed-too-many-special-education-students-as-fall-approaches-families-wonder-if-their-children-will-lose-another-school-year/> [https://perma.cc/TKA5-TJZQ].
 2. Valerie Strauss, *Virtual Education Was ‘A Disaster’ for Her Son with Down syndrome. Here’s What Students with Disabilities Really Need.*, WASH. POST (July 15, 2020), <https://www.washingtonpost.com/education/2020/07/15/virtual-education-was-disaster-my-son-with-down-syndrome-heres-what-students-with-disabilities-really-need/> [https://perma.cc/XHB8-Q4AU].
 3. Angela Nelson, *How COVID-19 Has Affected Special Education Students*, TUFTSNOW (Sept. 29, 2020), <https://now.tufts.edu/articles/how-covid-19-has-affected-special-education-students> [https://perma.cc/VC8X-YMG8].
 4. Jill Anderson, *Learning Loss and the Coronavirus*, HARV. EDCAST (Mar. 25, 2020), <https://www.gse.harvard.edu/news/20/03/harvard-edcast-learning-loss-and-coronavirus> [https://perma.cc/EG4D-3WJB].

based on the student's school district, available resources, and individual needs.⁵

Federal law provides substantial support for students with disabilities. Under the Individuals with Disabilities Education Act (“IDEA”),⁶ a public-school student with special needs has the right to obtain a free appropriate public education (a “FAPE”).⁷ The IDEA prepares “disabled children for employment and independent living and [promotes] a goal of integration and full inclusion of individuals with disabilities into the mainstream of American society.”⁸ The IDEA further mandates that students work with a team of educators, parents, and support staff to develop and execute what is known as an Individualized Education Program (“IEP”).⁹ Many IEPs include “related services,” which include additional support like speech therapy, physical therapy, and services that support the development of hands-on skills.¹⁰

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5. Matt Barnum, *How Much Learning Have Students Lost Due to COVID? Projections are Coming in, but It's Still Hard to Say*, CHALKBEAT (Oct. 6, 2020), <https://www.chalkbeat.org/2020/10/6/21504195/covid-schools-learning-loss-projections-nwea-credo> [<https://perma.cc/D6RS-B22T>]; see also Perry Stein & Valerie Strauss, *Special Education Students are Not Just Falling Behind in the Pandemic — They're Losing Key Skills, Parents Say*, WASH. POST (Aug. 7, 2020), <https://www.washingtonpost.com/local/education/special-education-students-are-not-just-falling-behind--theyre-losing-key-skills-parents-say/2020/08/05/ec1b91ca-cffd-11ea-9038-af089b63ac21story.html> [<https://perma.cc/ZE6W-ZVZZ>] (“[Parents] say their children are not just falling behind academically but are missing developmental milestones and losing key skills necessary for an independent life.”).
 6. 20 U.S.C. § 1401 (2004).
 7. *A Guide to the Individualized Education Program*, U.S. DEP'T EDUC. OFF. SPECIAL EDUC. & REHAB. SERVS. (July 2000), <https://www2.ed.gov/parents/needs/speced/iepguide/index.html#closer> [<https://perma.cc/X9MZ-QVZU>]. Some refer to FAPE as “free and appropriate education,” but it appears the formal name omits the “and.” Either way, they refer to the same term.
 8. 4 JAMES A. RAPP, EDUCATION LAW § 10C.04 (2020).
 9. 20 U.S.C. § 1412 (2004).
 10. Rashaan Ayesh & Erica Pandey, *Remote School's Strain on Students with Special Needs*, AXIOS (Aug. 15, 2020), <https://www.axios.com/coronavirus-education-special-needs-online->

When a school district fails to provide a student with a FAPE under the IDEA, that student is not left without remedies. This paper will focus on one particular remedy: compensatory education. Compensatory education is an equitable form of relief.¹¹ If a school district fails to provide a FAPE, parents may seek this award with the goal of having the district restore the student back to the position that she *would have* been in absent a violation under the IDEA.¹² However, the IDEA is silent on the details of this particular remedy. It is a judicially-created remedy, and courts have crafted it based on the IDEA's broad language.¹³ Courts may: "grant such relief as the court determines is *appropriate*."¹⁴ As courts are left with such broad discretion — to grant "appropriate" relief — it would seem likely that courts grant this award frequently. That is not entirely the case. COVID-19 has muddled the meaning of "compensatory education" and its restorative quality for students who are denied a FAPE. Former general counsel of the Vermont Agency of Education, Mark Oettinger, posed this question: "FAPE is a free and appropriate public education . . . the question is, what is *appropriate* in a global pandemic?"¹⁵ "Appropriate" should be defined in light of the purposes of the IDEA.¹⁶ To properly define "appropriate," the following must be understood: 1) whether a student was actually denied a FAPE during long-term remote

20176c9e-5905-4eb7-ab44-b0ea8a2c6e89.html [https://perma.cc/NCM6-Q4LW].

11. Perry Zirkel, *The Remedy of Compensatory Education Under the IDEA*, ED. L. REP., 1995, at 1, 1.
12. Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 516 (D.C. Cir. 2005).
13. *The Remedy of Compensatory Education Under the IDEA*, *supra* note 11.
14. 20 U.S.C. § 1415(i)(2)(c)(iii) (2004) (emphasis added).
15. Lola Duffort, *As Special Education Students Return to School, What are They Owed?*, VT DIGGER: EDUC. (Sept. 3, 2020), <https://vtdigger.org/2020/09/03/as-special-education-students-return-to-school-what-are-they-owed/> [https://perma.cc/FC64-XGYD] (emphasis added).
16. Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281, 294 (2013).

learning and 2) whether a student is eligible for compensatory education.

This paper will establish that compensatory education is the ideal solution to remedy rapid learning loss during COVID-19's duration, but its current application must be adjusted to account for circumstances where the district did not *cause* the denial of a FAPE. This paper also recognizes that even though COVID-19 has brought its own unique challenges within special education law, the problems with compensatory education have long existed. The pandemic has simply exposed problems associated with the remedy such as long delays, funding issues, and school districts' resistance towards being blamed for denial of a FAPE to students.¹⁷

In light of COVID-19's unique challenges, educators and schools have replaced compensatory education with a different term, that somewhat mirrors the existing remedy, called "recovery services."¹⁸ This new label allows districts to avoid their legal obligations and duties under the IDEA because "recovery services" are not federally mandated and simply act as optional recovery.¹⁹ In this way, schools are implementing measures that are merely discretionary and non-enforceable.²⁰ This behavior suggests that federal obligations have *changed* simply because schools are not necessarily the responsible actors for a denial of a FAPE. The current debate surrounding recovery services and compensatory education reveals how different groups have attached a negative connotation towards school districts while granting an award for compensatory education — which ultimately misdirects the discussion to school districts' liability

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17. Heather J. Hult, *The Problem with Compensatory Education as an IDEA Remedy and the Solution*, LEGAL INTELLIGENCER (Mar. 18, 2020), <https://www.law.com/thelegalintelligencer/2020/03/18/the-problem-with-compensatory-education-as-an-idea-remedy-and-the-solution/> [https://perma.cc/UE9M-ZHP8]; *see also* ANDREW FEINSTEIN, COUNCIL OF PARENT ATTY'S & ADVOC. (COPAA), LET'S NOT TALK "COMP ED" GENERALLY FOR COVID-19 CLOSURE (2020).
 18. *See* discussion *infra* Part II.
 19. MDE Releases "Recovery Services" Guidance, THRUN L. (Aug. 10, 2020), <https://www.thrunlaw.com/content/mde-releases-%E2%80%9Crecovery-services%E2%80%9D-guidance> [https://perma.cc/V2N5-KLRA].
 20. *Id.*

rather than the students who desperately need recovery. That is, the focus becomes the issue of whether to impose liability on the district, rather than providing equitable recovery to students.²¹

I will argue that the federal obligations under the IDEA to provide a FAPE have *not* changed simply because COVID-19 has shifted the reality of what schools can and cannot provide. Though the current judicially-crafted remedy for compensatory education does not clearly address what to do when the country's education leaders, courts, and hearing officers struggle to define the word "appropriate," the protections outlined in the IDEA, and interpreted by the courts, remain intact.

The remainder of the paper proceeds as follows: Part I examines special education law and the research behind learning loss. Part II describes details about the IDEA and outlines federal and state responses to unique special education issues during COVID-19. Part III outlines the judicial approach towards defining a FAPE and creating the compensatory education remedy through an analysis of case law. Lastly, Part IV offers solutions to rectify problems surrounding compensatory education in today's current educational climate, while simultaneously trying to mitigate the potential for greater learning loss. My solution imagines first an amendment to the IDEA that would include language particular to FAPE-denial during a national emergency. Second, I propose finding a way to shift districts' liability through changing how funding is allocated. Finally, I imagine a means of expediting the process of granting a compensatory education award by drawing from processes used within housing law during the pandemic.

I. LEARNING LOSS²²

Admittedly, children with disabilities are not the only ones to suffer learning loss during a pandemic. When educators, researchers, parents and districts express concern about the

21. *See generally* FEINSTEIN, *supra* note 17.

22. *See How to Mitigate Learning Loss During COVID-19 Pandemic: 7 Effective Ways*, POSITIVE ACTION (Sept. 29, 2021), <https://www.positiveaction.net/blog/learning-loss> [<https://perma.cc/5V8Y-CGL6>] ("learning loss refers to any specific or general loss of knowledge and skills or reversals in academic progress, most commonly due to extended gaps or discontinuities in a student's education.").

potential loss of skills for students, those worries exist for every student, whether in general education or special education.²³ All students have experienced some form of “foregone learning,” defined as “the learning which could have occurred in the absence” of COVID-19.²⁴ Data supports the belief that all students, with or without an IEP, will regress.²⁵

This paper focuses on special education for two main reasons. First, the existing gaps and weaknesses within federal disability law are highlighted by the pandemic and demand further analysis.²⁶ Second, the unique nature of special education requires its own evaluation. Many of the programs and forms of assistance that students with disabilities receive focus on tactile stimulation and in-person engagement.²⁷ Tactile stimulation includes a type of learning focused on students engaging with touch, texture, and

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23. Barnum, *supra* note 5; *see also* Anderson, *supra* note 4.
24. *Comparison of Compensatory Education and Recovery Services Due to COVID-19*, MICH. DEPT. EDUC. (June 2020), https://www.michigan.gov/documents/mde/RecoveryServices_Side-by-Side_694537_7.pdf [<https://perma.cc/KU76-LWWP>]; *see also Guidance to Address Foregone Learning for Students with IEPs as a Result of the COVID19 Pandemic*, MICH. DEPT. EDUC. (July 7, 2020), https://www.michigan.gov/documents/mde/RecoveryServices_695362_7.pdf [<https://perma.cc/KY7R-XCNL>].
25. “Students will retain approximately 50% of the math content learned prior to the public health emergency and approximately 70% of the reading content learned prior to the public health emergency.” *Id.* *See also* Megan Kuhfeld & Beth Tarasawa, *The COVID-19 Slide: What Summer Learning Loss Can Tell Us about the Potential Impact of School Closures on Student Academic Achievement*, NWEA RES. (Apr. 2020), https://www.nwea.org/content/uploads/2020/05/Collaborative-Brief_Covid19-Slide-APR20.pdf [<https://perma.cc/EVA2-F8NX>]; Per Engzell et al., *Learning Loss Due to School Closures During the COVID-19 Pandemic*, 118 PNAS 1, 1-5 (2021).
26. Some scholars argue that the pandemic has illuminated long-lasting problems within disability rights law. *See* Jasmine E. Harris., *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 30 (2020).
27. For example, tactile engagement is useful for children with sensory disorders. *See Sensory Input for Children with Special Needs*, WATSON INST. (Jan. 28, 2020), <https://www.thewatsoninstitute.org/sensory-input-for-children-with-special-needs/> [<https://perma.cc/SS3Z-3JRH>].

hands-on learning.²⁸ This form is nearly impossible to fully provide in a remote manner.²⁹ When schools first shifted to online learning during the onset of COVID-19 in March of 2020, many parents and educators feared that a remote learning model simply would not work for certain students.³⁰ During the months that followed, this fear proved true.³¹ Services like occupational or speech therapy, normally administered by trained, certified professionals who work with students in a hands-on and interactive way, were no longer available.³² Because of long-term remote learning, which has now lasted for nearly two years, parents of children with disabilities have become, and will continue to be, the “untrained substitutes” as these trained professionals and therapists attempt to guide students through remote videos or written instructions.³³

Though those working in general education must be aware of the impacts of remote learning and plan for intervention accordingly — many corrective measures for students without a disability may realistically be provided on a generalized basis. Special education law emphasizes the importance of the individual student, an individualized academic plan, and his or her unique educational needs.³⁴ Despite the learning loss taking place worldwide for all students, not all students were affected to the same degree. The IDEA has long recognized this its goal is not to afford students with learning disabilities the same school environment or accommodations as their non-special-education peers. Instead, the IDEA issues an “affirmative mandate,”

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28. *Tactile Stimulation Therapy Toys & Tools*, ESPECIALNEEDS, <https://www.especialneeds.com/shop/sensory-motor-skill-tools/tactile-stimulation.html> [<https://perma.cc/95S8-292N>] (last visited Mar. 20, 2022).
 29. Ayesh & Pandey, *supra* note 10.
 30. Strauss, *supra* note 2.
 31. *Id*; see also Amanda Gordon, *Remote Learning Doesn't Support Special Education Learners*, RIVER (June 13, 2020), <https://therivernewsroom.com/remote-learning-special-education-coronavirus/> [<https://perma.cc/NK5R-X3JG>].
 32. Gordon, *supra* note 31.
 33. *Id*.
 34. *Andrew F. ex rel. Joseph F. v. Douglas County School Dist.* RE-1, 137 S. Ct. 988, 994 (2017); 20 U.S.C. § 1401 (2004); *A Guide to the Individualized Education Program*, *supra* note 7.

premised on the notion that more vulnerable learners might require more services and more protections than their less-vulnerable peers to obtain an education that is, in the end, equally ‘meaningful.’³⁵ These standards that demand a “meaningful” learning experience are specific to the IDEA and must be addressed on an independent, individualized basis.

A. Summer Learning Loss as a Framework

Summer learning loss, a widely studied phenomenon, impacts all students at many different grade levels.³⁶ Though various factors contribute to the rate of learning loss such as socioeconomic status and students’ access to summer-learning programs, summer loss or the “summer slide” is a universal problem.³⁷ While studying summer learning loss, researchers have found that academic progress slows because students spend less time engaging with academic content.³⁸ Academic skills can “decay” over time simply because they are not being used.³⁹

35. *Coronavirus and Schools: “Compensatory Services” in a Post-Pandemic World*, SWEET, STEVENS, KATZ & WILLIAMS LLP (Apr. 13, 2020), <http://www.sweetstevens.com/newsroom/coronavirus-and-schools-compensatory-services-in-a-post-pandemic-world> [<https://perma.cc/55DE-SE2M>].

Thus, the IDEA entitles students with disabilities to a legally-enforceable written annual plan that ensures the attainment of child-specific meaningful outcomes; to transition planning that targets measurable post-secondary goals; to special protections related to discipline; and, of course, to an extended school year, week, or day when the conventional time allotted to all other learners is insufficient to ensure a “meaningful” outcome. No non-disabled peer can lay claim to *any* of these things.

36. *See generally* Megan Kuhfeld, *Summer Learning Loss: What We Know and What We’re Learning*, NWEA EDUC. BLOG (June 1, 2021), <https://www.nwea.org/blog/2021/summer-learning-loss-what-we-know-what-were-learning/> [<https://perma.cc/9P49-DMHT>].

37. David Quinn & Morgan Polikoff, *Summer Learning Loss: What is it, and What can We do about it?*, BROOKINGS (Sept. 14, 2017), <https://www.brookings.edu/research/summer-learning-loss-what-is-it-and-what-can-we-do-about-it/> [<https://perma.cc/G2V7-9B6X>].

38. Anderson, *supra* note 4.

39. *Id.*

COVID-19 has shifted concerns about the usual impact of summer learning loss to new extremes. The pandemic has highlighted an urgent need to mitigate this loss, stemming not only from the fear that there will be significant achievement gaps across schools, but also from the fear that educators will waste valuable time teaching content in one school year, only to have to reteach it in the following one.⁴⁰ While initial educational disruptions occurred in March 2020, some research began to suggest that by September 2020, students would lose “the equivalent of a full school year’s worth of academic gains.”⁴¹ More than a year after those projections, the concerns remained. One study found students’ reading fluency to be “approximately 30 percent behind what would be expected in a typical year”⁴² while another analysis found that an average student could “fall seven months behind academically.”⁴³

B. The “COVID Slide”

Because many students with disabilities have not received the vital resources and services they need during COVID-19, learning loss during the pandemic has become distinct from summer learning loss.⁴⁴ Many testimonies provide further insight into these unique remote learning challenges. Jabril Scott, for example, is a kindergarten student from Los Angeles who

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40. “Summer loss also undoubtedly increases the amount of time teachers have to spend ‘re-teaching’ last year’s content, likely contributing to the repetitiveness of the typical U.S. curriculum.” Quinn & Polikoff, *supra* note 37.
41. Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html> [<https://perma.cc/RJ59-WC8V>].
42. Carrie Spector, *New Stanford Study Sheds Light on How Much Learning Young Students Have Lost During Stages of the Pandemic*, STANFORD: GRADUATE SCHOOL EDUC. (Mar. 9, 2021), <https://ed.stanford.edu/news/new-stanford-study-sheds-light-how-much-learning-young-students-have-lost-during-stages> [<https://perma.cc/99ER-TJVK>].
43. Goldstein, *supra* note 41.
44. Jacobson, *supra* note 1; see also Javaid Siddiqi, *After Last Year’s Learning Loss, We Need a Plan for Students with Disabilities*, HILL (Dec. 2, 2021), <https://thehill.com/opinion/education/583778-after-last-years-learning-loss-we-need-a-plan-for-students-with> [<https://perma.cc/R3KZ-HCUF>].

typically receives a number of services like physical therapy, speech therapy and occupational therapy.⁴⁵ When schools shifted to remote learning, many weeks passed before Jabril’s mother received information from the school therapist.⁴⁶ When she did, she was greeted with at-home handouts as a replacement for her son’s in-person services.⁴⁷ Similarly, Allison Wohl found distance learning to be a “disaster” for her son, Julian, who has Down syndrome.⁴⁸ The school contributed to this “disaster” by failing “to provide appropriate access to both academic and social-emotional learning or the necessary services . . . that are essential to his education.”⁴⁹ In another example, six-year-old Finnegan’s mother, Beth Poague, knew that her son’s rare genetic condition caused “delays in speech and mobility . . . [and] sensory processing issues,” and that a remote-learning model would likely be an insufficient replacement for Finnegan.⁵⁰ He was used to his typical, highly social and specialized learning environment.⁵¹ Without the proper replacement for these in-person educational services, there is a significant risk that students will continue to experience rapid regression in cognitive and social skills as a majority of schools nationwide remain closed, or faced closures for a majority of the previous school year.

These examples illustrate that long-term remote learning has elevated concerns about learning loss to a level formerly unimaginable.⁵² The rapid loss of skills over the duration of the COVID-19 pandemic is known as the “COVID slide.”⁵³ Summer learning loss is backed by extensive research, but the “COVID-slide” is not.⁵⁴ This is because of the pandemic’s unprecedented and unpredictable nature.⁵⁵ Many of the attempts to actually

45. *Id.*

46. *Id.*

47. *Id.*

48. Strauss, *supra* note 2.

49. *Id.*

50. Gordon, *supra* note 31.

51. *Id.*

52. Kuhfeld & Tarasawa, *supra* note 25.

53. *Id.*

54. *Id.*

55. *Id.*

track COVID-19 learning loss, both from the spring of 2020 when remote learning began and at the time of this writing, provide *projections* of what learning loss will look like when schools reopen.⁵⁶ These projections are not based on actual data because such data are not available yet.⁵⁷ Without concrete data, some educators are skeptical about the accuracy of the projections.⁵⁸ Nevertheless, existing research about learning loss supports the assumption that students have regressed significantly.⁵⁹ Though some may argue that a certain degree of learning has happened over online learning platforms like Zoom, it is reasonable to gather that the learning is *not* as substantial as in-person learning, as the examples above suggest. That is why the “COVID-slide” has earned such attention.⁶⁰ Some researchers have used to term “unfinished learning” to attempt to encompass the aftermath of the pandemic’s first year and its lingering effects, at the time of writing this paper.⁶¹ Referring to learning loss as “unfinished learning” is an attempt to “capture the reality that students were not given the opportunity this year to complete all the learning they would have completed in a typical year.”⁶²

56. Barnum, *supra* note 5.

57. *Id.*; Engzell et al., *supra* note 25.

58. Barnum, *supra* note 5.

59. *Id.*

60. See Robin Lake & Bree Dusseault, *We Reviewed the School Reopening Plans for 106 Districts Around the Country. Here’s How They Square with Reality*, CRPE (Oct. 16, 2020), <https://www.crpe.org/thelens/we-reviewed-school-reopening-plans-106-districts-around-country-heres-how-they-square> [https://perma.cc/X4JY-8Z7H]. “Some instruction is likely better than none. But there’s also reason to be skeptical that the transition to move to remote instruction will replace what’s being lost.” Matt Barnum, *The Coronavirus Double Whammy: School Closures, Economic Downturn Could Derail Student Learning, Research Shows*, CHALKBEAT (Mar. 24, 2020), <https://www.chalkbeat.org/2020/3/24/21196123/the-coronavirus-double-whammy-school-closures-economic-downturn-could-derail-student-learning-resear> [https://perma.cc/N9QU-9NTF].

61. Emma Dorn et al., *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, MCKINSEY & COMPANY (July 27, 2021), <https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning> [https://perma.cc/THU3-XKX9].

62. *Id.*

Learning loss moves beyond concerns related to special education law. Some studies link learning loss during COVID-19 to devastating economic consequences for decades to come.⁶³ Even as little as four months of learning loss due to COVID-19 is projected to cost the United States nearly \$2.5 trillion in future earnings.⁶⁴ Education scholars estimate that students in K-12 “will experience a 3% lower income over their lifetimes because of the pandemic, translating to an average of 1.5% lower annual GDP for the remainder of the century.”⁶⁵ These projections are calculated by assuming that every additional year of a student’s schooling amounts to ten percent of future earnings.⁶⁶ By connecting the impacts of students’ learning loss to negative changes in GDP and the labor market, scholars conclude that learning loss could disrupt the well-being of society for future decades.⁶⁷

Past crises lend further evidence of COVID-19’s potential “slide” effects.⁶⁸ Though it only provides insight into a single

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63. George Psacharopoulos et al., *The COVID-19 Cost of School Closures*, BROOKINGS INST. (Apr. 29, 2020), <https://www.brookings.edu/blog/education-plus-development/2020/04/29/the-covid-19-cost-of-school-closures/> [https://perma.cc/QXM4-BVZB].
64. Lake & Dusseault, *supra* note 60. *See also* Psacharopoulos, *supra* note 63 (finding that this \$2.5 trillion figure is calculated by assuming each additional year of schooling equates to 10% of future earnings. The model then takes the number of months of education closures and estimates a future loss in earnings. Applying the model to the 76 million students in the U.S. (as an example), a mean of \$53,490 for annual earnings is approximately \$2.5 trillion collectively for four months of closures.).
65. Lauren Camera, *Report: COVID-19 School Closures Could Cost U.S. Economy \$14 Trillion*, U.S. NEWS (Sept. 14, 2020), <https://www.usnews.com/news/education-news/articles/2020-09-14/report-coronavirus-school-closures-could-cost-us-economy-14-trillion> [https://perma.cc/66PF-MZ3D].
66. *Id.* “We estimate that, without immediate and sustained interventions, pandemic-related unfinished learning could reduce lifetime earnings for K–12 students by an average of \$49,000 to \$61,000.” Dorn et al., *supra* note 61.
67. Lake & Dusseault, *supra* note 60.
68. Sarah Gonser, *What Past Education Emergencies Tell Us About Our Future*, EDUTOPIA (Apr. 8, 2020), <https://www.edutopia.org/article/what-past-education-emergencies-tell-us-about-our-future#>

3. schools placed children in courses based on readiness levels, not age.⁷³

The CRPE's findings reflect widespread efforts to bring both general and special education students back to grade-level after Katrina. Many leaders in education today suggest that we learn from these past crises as we deal with our present one.⁷⁴

These findings also highlight how recovery could operate for general education students following COVID-19. Many parents who do not have a child with a disability will nonetheless assert that their child deserves specific learning intervention and re-teaching for years following this pandemic. I believe the methods above highlight how schools can implement a generalized, collective remedy for students. These methods will work well for students who do not have an IEP designed for their needs. However, these techniques are inadequate for students with disabilities as they do not fully account for the intricacies and challenges for students with unique learning needs. For example, if a student with a reading disability is placed in an accelerated make-up program, as suggested in the above examples, that student will likely need individualized assistance within a restorative program that is offered to a group of general education students. Consequently, special education services demand a different remedial approach.

C. Students with Disabilities Experience Learning Loss at a Higher Rate

Research demonstrates that students with learning disabilities experience higher rates of regression in skills over the summer months than students without a disability.⁷⁵ One study, focused specifically on students with reading disabilities, found a significant regression in students' skills related to students' "proficiency with automatic decoding or fluent phonological processing."⁷⁶ Though students with disabilities might keep up with some of their peers during the school year, research shows

73. *Id.*

74. CMSI, *supra* note 71.

75. Jessica Menard & Alexander M. Wilson, *Summer Learning Loss Among Elementary School Children with Reading Disabilities*, 23 EXCEPTIONALITY EDUC. INT'L 72, 72 (2014).

76. *Id.* at 78.

that these students “lose more learning in the summer” and this further widens the disparities between students with and without disabilities over time.⁷⁷ In addition to a higher rate of regression, the study found that students with reading disabilities would potentially recover more slowly than those without disabilities upon returning to school.⁷⁸ In other studies comparing the rates of regression between special education students and general education students, those in special education showed the greatest regression.⁷⁹

Within the COVID-19 context, students with disabilities have lost valuable resources such as the opportunity to engage “with specialized educators and [learn in] structured learning environments.”⁸⁰ Some believe that there is no proper replacement for tactile-skills development during remote learning.⁸¹ This tactile-skills development includes “multisensory teaching technique[s]” that allow for children to learn through multiple senses, like teaching with textured objects, modeling materials, and large movement activity.⁸² Subsequently, the burden of maintaining those skills for a child rests on parents.⁸³ Students with disabilities are not only losing skills related to their academic

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77. *Lessons from School-Year Learning Gains and Summer Learning Loss— Implications for COVID-19 Recovery and Beyond*, NWEA: ACAD. GROWTH FOR STUDENTS WITH DISABILITIES, <https://www.nwea.org/content/uploads/2021/06/Academic-Growth-for-Students-with-Disabilities-Lessons-from-school-year-learning-gains.pdf> [https://perma.cc/B84Z-DH88] (last visited Mar. 8, 2022).
78. Menard & Wilson, *supra* note 75, at 83.
79. Harris Cooper et al., *The Effects of Summer Vacation on Achievement Test Scores: A Narrative and Meta-Analytic Review*. 66 REV. EDUC. RES. 227, 261 (1996).
80. Abbey R. Masonbrink & Emily Hurley, *Advocating for Children During the COVID-19 School Closures*, 146 PEDIATRICS: J. AM. ACADEMY PEDIATRICS 1, 2 (2020).
81. *Special Ed Under Pressure*, AXIOS (Aug. 15, 2020), <https://www.axios.com/back-to-school-podcast-special-education-strains-e6d1fd2f-29d1-4c69-82a3-5aae595ff50d.html> [https://perma.cc/5PHL-QLVC].
82. *What is Multisensory Teaching Techniques?*, LEXICON READING CTR., <https://www.lexiconreadingcenter.org/what-is-multisensory-teaching-techniques/> [https://perma.cc/5AWV-G2J3] (last visited Mar. 19, 2022).
83. *Special Ed Under Pressure*, *supra* note 81.

goals outlined in their IEPs, but they have also experienced a loss of team building exercises and social skills.⁸⁴ Research suggests that students with disabilities have “likely suffered disproportionately” from less instructional time in school and less connection to school communities during COVID-19.⁸⁵

Doctors and special education professionals provide some insight into the unique circumstances surrounding a child’s academic environment during COVID-19. Dr. Jenny Radesky, a pediatrician and assistant professor at Michigan Medicine C.S. Mott Children’s Hospital, wrote: “[m]ost [families] simply can’t access the special education supports they deserve by law unless they can be taught and receive therapies in person . . . parents are put in the impossible position of choosing their child’s developmental progress or their health, and the health of their teachers.”⁸⁶ Additionally, Dr. Chad Mosher, a physician with Palo Verde Behavioral Health, has expressed concerns about students’ increased anxiety during remote learning and students’ increased inability to focus or stay accountable without in-person engagement.⁸⁷

Just like Dr. Radesky and Dr. Mosher, other physicians have voiced the various benefits of in-person learning such as increased access to resources, personalized educational support, and the opportunities to participate in extracurricular activities and receive school lunches.⁸⁸ The American Academy for Pediatrics

84. See Anderson, *supra* note 4.

85. NWEA: ACAD. GROWTH FOR STUDENTS WITH DISABILITIES, *supra* note 77.

86. Perri Klass, *The Pandemic’s Toll on Children With Special Needs and Their Parents*, N.Y. TIMES (July 27, 2020), <https://www.nytimes.com/2020/07/27/well/family/children-special-needs-pandemic.html?auth=link-dismiss-google1tap> [https://perma.cc/Z2VW-YYTF].

87. Karly Tinsley, *Remote Learning is Stressing Out Students and Parents. Doctors Look at Long Term Side Effects and How to Help*, KOLD NEWS (Nov. 12, 2020), <https://www.kold.com/2020/11/13/remote-learning-is-stressing-out-students-parents-doctors-look-long-term-side-effects-how-help/> [https://perma.cc/2PLC-55P9].

88. *How Pediatricians Can Be Advocates for Children with Special Educational Needs*, CLE CLINIC: PEDIATRICS (Sept. 14, 2020), <https://health.clevelandclinic.org/how-pediatricians-can-help-children-with-special-needs-prepare-for-the-school-year/> [https://perma.cc/6YD8-5HRZ].

warns that, beyond remote learning's impact on learning loss, increased social isolation could "breed serious social, emotional and health issues."⁸⁹

II. THE IDEA'S SILENCE AND STATES' RESPONSES TO COVID-19 DISRUPTIONS

A. *The IDEA: A Closer Look at its Purpose*

Congress enacted the IDEA to give students with special needs a better education within the public-school system.⁹⁰ One of the IDEA's major policy goals involves providing students with disabilities the opportunity to participate and contribute positively to society.⁹¹ A further goal includes "[i]mproving educational results for children with disabilities" as it is "an essential element of [the] national policy," ensuring "equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."⁹² The IDEA's overall objective is to make sure that individuals with disabilities are not hindered or deprived of opportunities *because* of a disability.⁹³ Eligibility under Part B of the IDEA, the focus of this paper, requires an initial evaluation and an eventual determination that a child has a disability and requires specialized services.⁹⁴

B. *Compensatory Education: An Overview*

A parent may pursue a number of potential remedies if a school district fails to provide a FAPE.⁹⁵ Providing a FAPE to

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89. Anya Kamenetz, *U.S. Pediatricians Call for In-Person School This Fall*, NPR (June 29, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/06/29/884638999/u-s-pediatricians-call-for-in-person-school-this-fall> [<https://perma.cc/7GVJ-SWTU>].
90. *About IDEA*, U.S. DEP'T. EDUC., <https://sites.ed.gov/idea/about-idea/#IDEA-Purpose> [<https://perma.cc/8SRS-TKGA>] (last visited Feb. 19, 2022).
91. *Id.*
92. *Id.*
93. *Id.*
94. 34 C.F.R. §§ 300.301-300.306.
95. 34 C.F.R. § 300.101; *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 445 (2d Cir. 2015) (citing *School Committee of Town of Burlington, Mass v. Department of Educ. of Mass.*, 471 U.S. 359, 369 (1985)).

students is an IDEA mandate.⁹⁶ Compensatory education⁹⁷ is an equitable form of relief given to a student if she does not receive a FAPE; the goal is to restore the student to a position that she would have been in, had there not been an IDEA violation.⁹⁸ This remedy involves “a fund of money that a school makes available to children with disabilities to remedy a school’s violations of the child’s legal rights under the IDEA.”⁹⁹ Compensatory education is not an award of damages. The funds are put towards additional services, instruction and support for the child.¹⁰⁰ Case law has formed the compensatory education remedy — it does not appear explicitly in the IDEA nor within its regulations.¹⁰¹ It remains a “blurry standard” as it continues to evolve, and the Supreme Court has not directly defined it.¹⁰² The power for courts to craft

(“[A] court may award various forms of retroactive and prospective equitable relief, including reimbursement of tuition, compensatory education, and other declaratory and injunctive remedies.”). *See generally* Paula Maddox Roalson & Christina L. Garcia, *When Things Go Wrong . . . A Closer Look at Compensatory Damages*, WALSH GALLEGOS TREVINO RUSSO & KYLE P.C. (Jan. 17-19, 2017), https://cdn.ymaws.com/www.tcase.org/resource/resmgr/gic17/GIC17_Handouts/When_Things_Go_Wrong.pdf [<https://perma.cc/FH4Y-KSTF>].

96. 34 C.F.R. § 300.101.
97. *See generally* Peter W.D. Wright, *Compensatory Education Case Law from the Beginning Through Draper in 2008*, WRIGHTSLAW (Nov. 5, 2021), <https://www.wrightslaw.com/info/comp.ed.law.htm> [<https://perma.cc/LVP7-USLQ>] (stating that compensatory education refers to funds that are put towards a service or type of educational program. They often are awarded in the form of services, like additional speech therapy, occupational therapy, etc.).
98. *Compensatory Education: An Update Based on Recent Case Law*, WHITTED TAKIFF LLC, <http://www.whittedtakiffllaw.com/for-parents/memorandum/compensatory-education-update-based-recent-decisional-case-law/> [<https://perma.cc/757G-BS6B>] (last visited Feb. 12, 2022).
99. Hult, *supra* note 17.
100. Seligmann & Zirkel, *supra* note 16, at 281-82.
101. Wright, *supra* note 97. *See also* WHITTED TAKIFF, *supra* note 98.
102. Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 215, 224 (2013) (“The boundary for this remedy is also blurry, perhaps because it

this form of relief is suggested by language in the IDEA, ordering that courts “shall grant such relief as the court determines is *appropriate*.”¹⁰³

Parents do not have to rely solely on the courts to be able to obtain compensatory education for their children. The U.S. Department of Education (“the Department”) and the courts have granted hearing officers the authority to award compensatory education through adjudicative hearings.¹⁰⁴ State educational agencies also have this authority.¹⁰⁵ Because multiple entities are able to grant these awards, they are most frequently awarded outside of the courtroom.¹⁰⁶ A school district faces liability if a student has received an “inappropriate” education,¹⁰⁷ regardless of any showing bad faith or egregious conduct. Just as the IDEA requires an individualized, specific approach towards implementing IEPs, this remedy “warrants careful and practical attention.”¹⁰⁸

C. Federal Responses to COVID-19 Closures

During the pandemic’s emergence in March of 2020, the Department was no doubt presented with novel challenges as it attempted to “provide services and supports to children with disabilities in ways [it] could never anticipate.”¹⁰⁹ The outbreak of COVID-19 sparked educators’ disagreements over how to

is still evolving and has yet to receive Supreme Court or congressional clarification.”).

103. 20 U.S.C. § 1415(i)(2)(c)(iii) (2004).

104. *The Remedy of Compensatory Education Under the IDEA*, *supra* note 11.

105. *Id.*

106. Seligmann & Zirkel, *supra* note 16, at 282.

107. *M.C. on Behalf of J.C. v. Central Regional School Dist.*, 81 F.3d 389, 391-92 (3d Cir. 1996); *see also The Remedy of Compensatory Education Under the IDEA*, *supra* note 11.

108. *The Remedy of Compensatory Education Under the IDEA*, *supra* note 11, at 3.

109. David Cantrell & Katherine Neas, *Return to School Roadmap: Children with Disabilities under IDEA*, U.S. DEP’T EDUC. (Aug. 24, 2021), <https://sites.ed.gov/idea/files/rts-idea-08-24-2021.pdf> [<https://perma.cc/W7FQ-HYQY>].

execute IEPs during distance learning.¹¹⁰ These disagreements initially raised questions about whether or not IEPs *could* be executed remotely, due to what some considered “insurmountable barriers”¹¹¹ presented by federal disability law, and general requirements for educators who teach students with special needs.¹¹² In the Department’s initial March 2020 guidance, it reminded school districts that the “provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.”¹¹³ The Department also expressed its belief that “disability-related modifications” could effectively be provided online.¹¹⁴ The Department granted educators and IEP teams *flexibility* in supporting students with disabilities during remote learning.¹¹⁵ Flexibility, however, is not to be mistaken with waiving any provision of the IDEA or granting permission to deny a FAPE.¹¹⁶ The federal guidance simply suggested that a FAPE could look different, but did not change.¹¹⁷

The Department also issued a number of “Questions and Answers” documents concerning special education during

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110. *Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> [<https://perma.cc/KT6U-KF68>] (last visited Feb. 12, 2022).
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* See Erica L. Green, *DeVos Decides Against Special Education Waivers During the Pandemic*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/us/politics/coronavirus-devos-special-education.html> [<https://perma.cc/8RWC-BWL4>] (arguing educators also advocated for waivers of federal disability law requirements which were denied by the U.S. Department of Education).
116. Ashley A. Akins & Sherry Culves, *US DOE Issues New IDEA Guidance on COVID-19, Child Find, and FAPE*, NAT’L L. REV. (Aug. 25, 2021), <https://www.natlawreview.com/article/us-doe-issues-new-idea-guidance-covid-19-child-find-and-fape> [<https://perma.cc/B8L5-368N>].
117. *Id.*

COVID-19, with many of the answers leaving it up to a student's IEP team to determine what services they were required to provide.¹¹⁸ Regarding compensatory education, the documents noted that a child's IEP team could make an "individualized determination 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."¹¹⁹ The federal guidance did not appear to guide families away from seeking compensatory education as a viable award for their child, following long-term school closures.

D. State COVID-19 Responses

The judicial standard for awarding compensatory education is individualized.¹²⁰ Typically, when a district denies a FAPE, the violation is "student-specific,"¹²¹ but the inability for schools to provide comparable at-home education and services during COVID-19 has created a widespread denial of a FAPE for students across the country. This creates a conundrum: on the one hand, an award of compensatory education must be individually designed,¹²² while on the other hand, students all over the country seek essentially the same relief: restore students back to the place they *would have* been in, absent a widespread

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118. *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, U.S. DEP'T EDUC., <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf> [<https://perma.cc/4YXC-F867>] (last visited Feb. 12, 2022); *Implementing Part B of the IDEA and Section 504 During a COVID-19 Outbreak*, U.S. DEP'T EDUC. (Sept. 28, 2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf> [<https://perma.cc/4YXC-F867>] ("[A]n IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE . . . would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.").
119. *Id.*
120. *FAQ on Compensatory Education in the time of COVID-19*, COPAA, <https://www.wrightslaw.com/covid/2020.0813.COPAA.CompEd.FAQ.pdf> [<https://perma.cc/9G3R-87FJ>] (last visited Mar. 8, 2022).
121. Complaint at 4, *J.T. v. de Blasio*, 500 F. Supp. 3d 137 (S.D.N.Y. 2020) (No. 20 Civ. 5878).
122. *A Guide to the Individualized Education Program*, *supra* note 7.

deprivation of a FAPE during long-term remote learning.¹²³ The tension between mass deprivation and individual needs has led educators and state governments to start to move away from encouraging compensatory education awards as the appropriate remedy during COVID-19.¹²⁴ Instead, they have pursued what are called “recovery services.”¹²⁵ This new terminology has created a few major problems.

First, this shift in language stems from a central disagreement among educators and education scholars as to whether or not students were actually denied a FAPE. Some believe all schools have met their federal obligation during remote learning, given the circumstances. Other disability-rights advocates adamantly disagree.¹²⁶ If a child was *not* denied a FAPE, the child cannot assert that they are entitled to this equitable remedy. Districts do not have to fear the increased demands for awards if they assert a FAPE was never denied.

Second, to some educators, compensatory education acts as a mechanism to endlessly blame the district.¹²⁷ The Council of Parent Attorneys and Advocates (“COPAA”) writes that those who resist compensatory education during the pandemic see it as “punitive” towards the district.¹²⁸ As an experienced advocate in this work, Andy Feinstein agrees with this pushback.¹²⁹ He writes that using the term “compensatory education” creates a

123. Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 516 (D.C. Cir. 2005).

124. See, e.g., MICH. DEPT. EDUC., *supra* note 24.

125. *Id.* See discussion *infra* Part II(C); see also *Students with Disabilities Guidance*, OHIO DEP’T EDUC., <http://education.ohio.gov/Topics/Reset-and-Restart/Students-with-Disabilities> [<https://perma.cc/D6FP-42ND>] (“[Recovery services] increasingly being used by educators across the country, in addition to compensatory services, in response to the unprecedented impact COVID-19 has had on schools and student learning”).

126. Duffort, *supra* note 15.

127. *Position Statement on Provision of Compensatory Education in Response to Lost Education as a Result of COVID-19*, COPAA [hereinafter *Position Statement on Provision of Compensatory Education*], https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/2020_docs/copaa_statement_on_compensat.pdf [<https://perma.cc/PZX6-X8PW>] (last visited Feb. 20, 2022).

128. *Id.*

129. FEINSTEIN, *supra* note 17.

“confrontation posture” with school districts that is not appropriate within the context of the pandemic.¹³⁰ By contrast, COPAA argues that creating this new language to avoid blaming the district “neglects the needs of the student, presumes every district provided special education and related services to all students with disabilities, and is an attempt to circumvent legal obligations under a cloak of terminology.”¹³¹

Finally, a fundamental problem with the new terminology “recovery services” is perhaps most clearly articulated while looking at state guidance. Michigan’s Department of Education, for example, provides the following:

There is *no entitlement or requirement* for districts to provide recovery services under the IDEA or MARSE. If parents disagree with the district’s decision regarding whether and to what extent recovery services are warranted, *there is no legal remedy*.¹³²

This guidance highlights major problems. “Recovery services” might motivate schools and districts to offer only a minimal degree of recovery. Providing recovery services poses the risk of forcing districts to end up allocating resources from local schools, “which are already reduced due to added expenditures for technology and safety equipment/services and lower tax revenue.”¹³³ Admittedly, recovery services might mitigate one major problem posed by COVID-19 by reducing the anticipated mass demand for compensatory education awards. Recovery services may help some students who would have otherwise pursued a remedy under the IDEA and consequently, discourage parents from taking further action.

130. *Id.*

131. *Position Statement on Provision of Compensatory Education*, *supra* note 127.

132. *Guidance to Address Foregone Learning*, *supra* note 24 (“Recovery services are not a mandatory requirement nor are they a remedy identified under IDEA or the Michigan Administrative Rules for Special Education (MARSE).”) (emphasis added). While I am using Michigan as an illustration, many other states have made this shift in terminology. *See, e.g.*, DISABILITY RIGHTS MD., COMPENSATORY EDUCATION DURING THE COVID-19 PANDEMIC: A BRIEF GUIDE FOR PARENTS #5 (2021); *Students with Disabilities Guidance*, *supra* note 125.

133. Duffort, *supra* note 15.

The larger problem, however, is that replacing compensatory education with a term that is not legally required under the IDEA delays a parent and child's access to the remedy that *would* restore a student and uphold a school district's federal obligation to provide a FAPE. This shift in terminology, from compensatory education to recovery services, creates a potential two-step process for parents: the schools would give a version of recovery services, then the parent would have to evaluate whether the recovery services provide a FAPE.¹³⁴ If the parent believes that the recovery services are inadequate, they would have to *then* pursue an award for compensatory education separately.¹³⁵ Thus, recovery services "can eventually cause even more litigation in terms of not only whether the determination [of an award] is appropriate, but also whether or to what extent it fulfills any entitlement to compensatory education."¹³⁶ The meaning of the term "appropriate" within a FAPE continues to create confusion, as it is unclear whether providing a service in and of itself *is* the remedy and whether or not it was made in light of the children's circumstances, rather than the district's.¹³⁷

In taking this separate approach outside of compensatory education remedies, states have attempted to distinguish each remedy. Michigan, for example, produced a side-by-side chart outlining the differences between compensatory education and recovery services.¹³⁸ Recovery services result from "a loss of instructional time due to the COVID-19 pandemic." By contrast, a compensatory education award comes from a district's "identified noncompliance leading to educational loss and *a denial of a free appropriate public education* (FAPE)." The Texas Department of Education took similar steps, admitting that the IDEA does not define "recovery services," but rather, it is a term that educators around the country independently created.¹³⁹

134. "[I]f a parent believes that a student has been denied a FAPE as a result of the school's decision on recovery services, there is nothing in the IDEA or MARSE that prohibits a parent from filing a state or due process complaint." *See* THRUN L., *supra* note 19.

135. Duffort, *supra* note 15.

136. *Id.*

137. *See* discussion *infra* Part III.

138. MICH. DEPT. EDUC., *supra* note 24.

139. *Specialized Supports for Learners and Families*, COPPELL ISD, <https://www.coppellisd.com/Page/16840> [<https://perma.cc/>

Other states have followed suit including Ohio,¹⁴⁰ West Virginia,¹⁴¹ and Iowa,¹⁴² to name a few.

As suggested, the remedy of recovery services is not by itself severely problematic. Many aspects of “recovery services” sound ideal for parents, IEP teams, and the students, such as the need to help students recover from educational loss quickly. The underlying problem is that the existing legal remedy — compensatory education — is the remedy that properly falls under the federal guarantee that every child is entitled to a FAPE. By contrast, recovery services operate on a “no fault” basis. Because school districts are not required to provide recovery services, they would not be required to oversee the quality of those recovery services even if they were provided. These enforcement issues raise concerns about whether a student would have the resources to adequately recover. Again, this resistance to compensatory education reveals its problematic association with a district’s culpability.

To add to the ongoing debate, Marilyn Mahusky, an attorney with Vermont Legal Aid’s Disability Law Project, argues that this new terminology (“recovery services”) is providing an artificial “safe harbor” for schools.¹⁴³ Further, Mahusky believes that “the state’s reasoning assumes, incorrectly, that the

Z3GC-U9QF] (click “Intervention Services Special Education, 504, and Dyslexia” in the center list of support services, then scroll to “COVID Response Services”) (last visited Mar. 20, 2022).

Neither the Individuals with Disabilities Education Act (IDEA) nor Article 7 defines the term “recovery services.” This term is increasingly being used by educators across the country in lieu of the term compensatory services in response to the unprecedented impact COVID-19 has had on our schools and its impact on the learning of ALL students. The term recovery services reflects the universal need of all learners to recover from any educational gaps in learning or loss of skills caused by the unexpected school building closures.

140. OHIO DEP’T EDUC., *supra* note 125.
141. W. VA. OFF. SPECIAL EDUC., COVID-19 RECOVERY SERVICES VERSUS COMPENSATORY SERVICES (2020).
142. IOWA DEP’T EDUC., COVID-19 RECOVERY SERVICES FOR LEARNERS RECEIVING IDEA SERVICES FREQUENTLY ASKED QUESTIONS (FAQ) (Feb. 8, 2021).
143. Duffort, *supra* note 15.

pandemic changes what students are entitled to under federal law.”¹⁴⁴ Recovery services, according to Mahusky and other advocates, act as a district’s way of dodging potential litigation tied to compensatory education.¹⁴⁵ These disputes between supporters of “recovery services,” and their critics all beg the lurking question: Why is the existing remedy of compensatory education insufficient? Or, stated another way: why did the pandemic force schools to move outside of a remedy that already existed for learning loss?

Though the onset of the pandemic instigated the initial debate surrounding recovery services and compensatory education, the debate and confusion stemming from shifting terminology still exists. In July 2021, when educators and education scholars anticipated a return to in-person learning, scholar Perry Zirkel wrote that trying to determine “the distinction between and the implementation of the remedy of compensatory education and the federal/state guidance for compensatory (i.e., recovery) services” continued to “loom” as one of the “leading issue[s]” in special education.¹⁴⁶ In a later update on November 10, 2021, Zirkel again outlined recent cases emerging from COVID-19, acknowledging the “emerging confusion” about recovery services.¹⁴⁷ And again, in that same update, he described that the distinction and implementation of compensatory education as distinct from recovery services remained “an unresolved source of confusion.”¹⁴⁸

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144. *Id.* See also Seligmann & Zirkel, *supra* note 16 (describing the process of presenting evidence of a child’s regression and lost educational benefit while requesting a compensatory education award).
145. Duffort, *supra* note 15.
146. Perry Zirkel, *COVID-19 Guidance and Case Law: Summer Update*, PERRY A. ZIRKEL: MONTHLY LEGAL UPDATES (July 13, 2021), <https://perryzirkel.com/2021/07/13/covid-19-guidance-and-case-law-summer-update/> [https://perma.cc/E6Q6-VALH].
147. Perry Zirkel, *COVID-19 Guidance and Case Law: Fall Update*, PERRY A. ZIRKEL: MONTHLY LEGAL UPDATES (Nov. 10, 2021), <https://perryzirkel.com/2021/11/10/covid-19-guidance-and-case-law-fall-update-2021/> [https://perma.cc/8YFG-SUGC].
148. *Id.*; The distinction between recovery services and compensatory education appears to be interpreted differently across state lines, attorneys, and educators. See *Special Education During COVID-What You Need to Know*, SPECIAL NEEDS ALL., <https://www.specialneedsalliance.org/blog/special-education-during-covid-what->

During COVID-19, the federal obligations to a child under the IDEA have not changed. Beyond using recovery services as a way to redirect the potential requests for compensatory education, states may also try to use recovery services as proof that a child was not denied a FAPE.¹⁴⁹ That is, when a court or hearing officer evaluates the sufficiency of a child’s education, the school might assert that its provision of recovery services demonstrates that the school did not deny a FAPE. Yet, as mentioned above, schools are not required by law to prove that recovery services are sufficiently comparable to compensatory education awards.

III. COURTS DEFINING A FAPE

A. The Supreme Court’s Definition of a FAPE

Courts have not always interpreted the FAPE requirement under the IDEA uniformly. The most recent case outlining the Supreme Court’s interpretation of a FAPE is *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*,¹⁵⁰ where the parents of Endrew, an autistic child, sued the public-school district for tuition reimbursement after they moved Endrew to a private school.¹⁵¹ The parents argued that Endrew’s public school formulated an insufficient IEP over many years, and therefore, failed to provide a FAPE.¹⁵² The *Endrew* Court defined a FAPE as including special education instruction designed specifically for the child, and related services.¹⁵³ In outlining the specificities of

you-need-to-know/ [https://perma.cc/Y7D7-CAUC] (last visited Mar. 20, 2022) (“The difference between recovery services and compensatory services seems to be based upon the reasonableness of the attempt to provide a FAPE within COVID-related restrictions and the lack of progress.”).

149. THRUN L., *supra* note 19.

150. 137 S. Ct. 988 (2017).

151. *Id.* at 996.

152. *Id.*

153. *Id.* at 1000.

This guidance is grounded in the statutory definition of a FAPE. One of the components of a FAPE is “special education,” defined as “specially designed instruction . . . to meet the unique needs of a child with a disability.” §§ 1401(9), (29). In determining what it means

an IEP, the Court recognized that special education and related services should support a student in reaching his or her annual goals.¹⁵⁴

In an earlier case, the Court in *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*¹⁵⁵ held that an IEP had to be “reasonably calculated to enable the child to receive *educational benefits*.”¹⁵⁶ The *Endrew* Court further developed this standard, holding that an IEP must be formulated to allow a student to progress, “in light of the *child’s* circumstances.”¹⁵⁷ In scrutinizing the meaning of “appropriate progress,” the *Endrew* Court recognized that “appropriate progress” could be measured by assessing how “[r]egular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted.” Further, an educational program had to be “appropriately ambitious” in order for the student to actually be able to progress each year.¹⁵⁸

Attorneys who work in special education law have looked to the *Endrew* standard for guidance during COVID-19, but found that its focus on a *child’s* circumstances does not answer the many questions the pandemic has raised.¹⁵⁹ In a podcast addressing these concerns, one attorney acknowledged that the problem with looking at the *Endrew* standard is that it is “not the child’s circumstances that have changed in this pandemic, it’s the

to “meet the unique needs” of a child with a disability, the provisions governing the IEP development process are a natural source of guidance: It is through the IEP that “[t]he ‘free appropriate public education’ required by the Act is tailored to the unique needs of” a particular child.

154. *Id.*

155. 458 U.S. 176 (1982).

156. *Id.* at 207.

157. *Endrew F.*, 137 S. Ct. at 999 (emphasis added).

158. *Id.*; see also K.D. by and through Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248, 254 (3rd. Cir. 2018) (“Our test requires an educational program ‘likely to produce progress, not regression or trivial educational advancement.’”).

159. *Distance Learning Challenges And Successes During The Covid-19 Pandemic*, WALTER HAVERFIELD, <https://www.walterhav.com/podcasts-index/season-4-episode-3-distance-learning-challenges-and-successes-during-the-covid-19-pandemic/#toggle-id-1> [<https://perma.cc/G4S3-XQR3>] (last visited Feb. 22, 2022).

world's circumstances."¹⁶⁰ The framework that assigns blame to the school district and in turn, liability, unravels when the district is not necessarily responsible. One disability rights center asks: "[s]hould school districts consider COVID-19 closures as 'circumstances' under the Endrew F. standard?"¹⁶¹ These emerging, complicated questions should not enable districts to eschew their federal obligations under the IDEA, even though there are no easy answers.

B. FAPE in the COVID-19 Context

A school may owe compensatory services to a student when: 1) a school does not provide a timely evaluation for a child with a disability; 2) a school fails to provide the services within a child's IEP; and 3) when a school offers an inappropriate plan, or a plan has not allowed a child to make progress towards IEP goals.¹⁶² Though compensatory education acts as a viable and preferred remedy, few awards had been granted during COVID-19.¹⁶³ The need for widespread relief and the individualized nature of special education create competing interests. On the one hand, an award for compensatory education is individualized and specific.¹⁶⁴ Just as a student's IEP is specialized for *that* student, a compensatory education award is similarly individualized.¹⁶⁵ On the other hand, the individualized approach in designing this relief takes time, particularly when the process of creating the award involves analyzing the student's work product, skills, and

160. *Id.*

161. Amanda Hess & Karen Rosenberg, *Special Education in the Time of COVID-19*, NDRN (June 16, 2020), <http://materials.ndrn.org/virtual20/session33/Special%20Education%20in%20the%20Time%20of%20COVID/SC.NH%20NDRN%20June%2016%20FINAL.pdf> [<https://perma.cc/GRJ4-AH2D>].

162. *Making Things Right: Rights of Recovery in Education Disputes*, CHILD.'S HOSP. PHILA., <https://www.carautismroadmap.org/making-things-right-rights-of-recovery-in-education-disputes/> [<https://perma.cc/9QZP-HYZ6>] (last visited Jan. 25, 2021).

163. Perry Zirkel, *COVID-19 (IDEA and § 504) Case Law: Limited Beginnings and Potential Analogies*, PERRY A. ZIRKEL (June 30, 2020), <https://perryzirkel.com/2020/06/29/covid-19-case-law-idea-and-504/> [<https://perma.cc/2SXL-VUF3>].

164. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 525 (D.C. Cir. 2005).

165. DISABILITY RIGHTS MD., *supra* note 132; *Reid*, 403 F.3d at 518.

data.¹⁶⁶ This delay will likely cause further regression in skills.¹⁶⁷ Special education at its core still functions like a mass service, despite the fact that the service emphasizes individual needs.

In response to initial, growing concerns about learning loss during COVID-19, a small number of cases were filed during the pandemic's onset. One complaint, filed in the U.S. District Court of Hawaii, asked the Secretary of Education to establish data-driven and uniform procedures, allowing for equitable relief on a wider, more efficient basis.¹⁶⁸ The complaint aimed to “facilitate the resolution of what could otherwise be thousands of individual claims for compensatory education that may come at significant financial cost to the taxpayer and school system in Hawaii.”¹⁶⁹ Further, it attempted to expedite the process of granting awards by joining special education students together in a class action suit.¹⁷⁰ This complaint highlighted that students *have* experienced a denial of a FAPE and the request for an appropriate remedy included collective relief and individual evaluations.¹⁷¹ This was not meant as a tool to “further burden” a school district or state. Rather, the plaintiff wanted to “lift the burden of defining an equitable remedy” by consolidating the number of cases before the court.¹⁷² The Hawaii complaint demonstrates that despite efforts to evaluate a student's educational regression, it might “not be realistically measurable[.]”¹⁷³

166. DISABILITY RIGHTS MD., *supra* note 132.

167. Complaint at 2, *W.G. v. Kishimoto*, No. 1:20-CV-00154 (D. Haw. Apr. 13, 2020). *See* *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 157 (S.D.N.Y. 2020).

168. Complaint at 2, 4-5, *W.G. v. Kishimoto*, No. 1:20-CV-00154 (D. Haw. Apr. 13, 2020).

169. *Id.* at 2. “Plaintiffs seeks declaratory relief which will allow Plaintiffs the right to pursue individual remedies for compensatory education in collateral actions against Defendant at the administrative level using collateral estoppel in order to efficiently seek relief for Plaintiffs[.]” *Id.* at 4.

170. *Id.* at 2.

171. *Id.* at 3-5.

172. *Id.* at 2.

173. *Id.* *See also* *COVID-19 Class Action Update: Current, Resolved Cases*, DA DIST. ADMIN. (Nov. 16, 2020), <https://districtadministration.com/covid-19-class-action-update-current-resolved-cases/> [<https://perma.cc/XUR8-6QJP>].

What began during the onset of the pandemic continues at the time of writing this paper: parents bear a significant burden in proving that their child is eligible for relief.¹⁷⁴ Organizations and websites that provide general information about disability rights advise that parents carefully track loss as the school year goes on, so that they have a claim for compensatory education once school resumes.¹⁷⁵ This sort of tracking includes recording any signs of a child’s regression, mental health treatment, and interventions that were needed during remote learning.¹⁷⁶ The central goal is to be able to demonstrate the “lost educational opportunity” that students sustained.¹⁷⁷

Another early case that shows how courts initially responded to the pandemic is *J.T. v. de Blasio*, a class action case filed in New York in late July 2020. Plaintiffs brought a suit against Mayor de Blasio of New York, the New York City Department of Education, and “[t]he School Districts in the United States” — which included over 13,800 districts.¹⁷⁸ In their complaint, Plaintiffs quoted members of the Association of Educational Service Agencies (“AESA”): “Given that this [COVID-19] was not a student-specific denial of FAPE, but a school closure that impacted ALL students, this could spiral out of control quickly. If one parent ‘wins’ a complaint, it would essentially mean that

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174. See Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005); *Compensatory Education and ESY Discussions After COVID-19*, DISABILITY RIGHTS OHIO, https://www.disabilityrightsohio.org/esy_covid [https://perma.cc/2N5D-XCPS] (last visited Mar. 21, 2022).
175. DISABILITY RIGHTS OHIO, *supra* note 174 (“You [] need to be ready to request compensatory education services and Extended School Year (ESY) services . . . Because your child will not automatically be entitled to receive these services, it will be up to you to collect the data to justify the request.”).
176. Jennifer Gavin, *Are Special Education Services Required in the Time of COVID-19?*, ABA (Mar. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/are-special-education-services-required-in-the-time-of-covid19/> [https://perma.cc/4W26-SMFB].
177. Complaint at 2, *W.G. v. Kishimoto*, No. 1:20-CV-00154 (D. Haw. Apr. 13, 2020).
178. *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 147 (S.D.N.Y. 2020).

all families can file and expect the same outcome.”¹⁷⁹ Though the language in this complaint seemed to suggest the potential for widespread relief within a FAPE-denial framework, the court dismissed all parties to this suit except the New York City Department of Education.¹⁸⁰ Though parties were later dismissed, this case nonetheless suggests that schools, parents, and students around the country have acknowledged a mass deprivation of a FAPE, and believe that a class action suit would be an appropriate way to have a court provide widespread recovery, while recognizing the individualized nature of students’ academic needs.

These cases demonstrate that some courts are not willing to grant widespread compensatory education awards but yet, are still considering the questions surrounding whether a student was denied a FAPE. Both cases described above, and those that have followed during the pandemic’s duration,¹⁸¹ also suggest how difficult it would be and has been for a parent to pursue an award for compensatory education. As one attorney has expressed it, this process for recovery through compensatory education is “often combative and arduous.”¹⁸²

IV. RECOMMENDATIONS

COVID-19 revealed the inadequacy underlying the process of granting compensatory education awards. This in part stems from the long-standing tendency to associate this remedy with a district’s culpability.¹⁸³ The following measures should be taken

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179. Complaint at 13, *J.T. v. de Blasio*, 500 F. Supp. 3d 137 (S.D.N.Y. 2020).
 180. *Id.*; *J.T.*, 500 F. Supp. 3d at 194 (The court eventually dismissed the entire case because plaintiffs did not exhaust all administrative remedies. This outcome reveals that most awards are granted on an administrative level because of the IDEA’s remedy exhaustion requirement.).
 181. *COVID-19 Guidance and Case Law: Summer Update*, *supra* note 146.
 182. Amanda Morris, *Parents of Students With Disabilities Try to Make Up for Lost Year*, N.Y. TIMES (Sept. 17, 2021), <https://www.nytimes.com/2021/09/17/nyregion/special-needs-children-coronavirus-pandemic.html>. [<https://perma.cc/5DCT-4NCP>].
 183. See Cory Turner & Rebecca Klein, *After Months of Special Education Turmoil, Families Say Schools Owe Them*, NPR (June 16, 2021), <https://www.gpb.org/news/2021/06/17/after-months->

to ensure that students will be able to recover in the aftermath of COVID-19.

A. New Language in the IDEA

Perhaps the most obvious solution to the problems surrounding compensatory education during the pandemic is to amend the law. The IDEA is silent on what to do during a national emergency as it pertains to granting compensatory education remedies. Some insist that “the next time the IDEA gets reauthorized, it will need to *include language* that describes how it will be implemented during a national crisis.”¹⁸⁴ The language could look something like the following:

a) In the case of a National Emergency, natural disaster, or any other unanticipated circumstance that creates a prolonged school closure, the Federal Government shall provide emergency funding¹⁸⁵ for State and local educational agencies to grant equitable relief.

of-special-education-turmoil-families-say-schools-owe-them [https://perma.cc/8XJ5-HATT] (“To school districts, though, the words ‘compensatory services’ strike a nerve, because they often involve attorneys and costly remedies and because, districts say, they imply wrongdoing.”).

184. Anne M. Zachry, *Regression, Compensatory Education, & Quarantine*, KPS 4 PARENTS (Apr. 13, 2020), <https://kps4parents.org/regression-compensatory-education-quarantine/> [https://perma.cc/65UM-EE37] (emphasis added).

The absence of any such language automatically puts LEAs out of compliance when disaster hits, which benefits no one; leaves students stranded without a contingency plan, deprived of a FAPE and actively regressing with each passing day; and creates compensatory education claims that will become a greater burden on the public education system than serving these students appropriately during a crisis in the first place.

185. On the issue of funding, the American Rescue Plan Act did grant districts funding in addition to usual IDEA Part B funds. Sherry Culves & Ashley A. Akins, *US DOE Issues New IDEA Guidance on COVID-19, Child Find, and FAPE*, NAT’L L. REV. (Aug. 25, 2021), <https://www.natlawreview.com/article/us-doe-issues-new-idea-guidance-covid-19-child-find-and-fape> [https://perma.cc/92RG-XM9U]. But this solution imagines that the funding is built into the IDEA itself—rather than relying on Congress to offer additional funding through other legislation.

(i): *If the circumstances in (a) cause widespread denials of FAPE, students with disabilities are still entitled to equitable remedies under this Act.*

(ii): *State educational agencies, State agencies, or local educational agencies shall guarantee the same procedural safeguards for students, as outlined in this Act.*

Though this language is very general, it encompasses various types of emergencies, and ultimately acknowledges the possibility that even if a FAPE is denied from an alternative source, such as an unforeseen national emergency causing school closures, rather than a school district's shortcomings, IDEA protections will remain intact. As the IDEA functions now, it lacks clarity as to how to respond to circumstances where a FAPE was denied for reasons other than a district's noncompliance. This new statutory language would also encourage states to act more uniformly because of clear federal direction. The lack of federal guidance during COVID-19 has created uncertainty and inconsistency. If new language is not added to the statute itself, the Department should at least provide guidance "specific to the meaning and implementation of compensatory services as a proactive measure at the district level."¹⁸⁶

B. Shifting Blame and Funds Distribution

Another recommendation focuses on adjusting the judicial standard both in terms of approach and the emphasis on individualized recovery. Courts and hearing officers should move away from a blaming approach, and instead, find the district *responsible* for restoring the student, even if it is not *liable* for the harm. This shift would require new funding sources and distribution mechanisms for granting compensatory education awards.

Though the intricacies surrounding special education law cannot be reduced to solely a resource problem, it is still a major force behind these complications. Currently, schools are responsible both for crafting equitable awards and distributing funds.¹⁸⁷ Heather Hult, an education lawyer, writes that because

186. Perry A. Zirkel, *Legal Decisions for Special Education COVID-19 Issues: Emerging Answers*, 62 INCASE 1, 6 (2021).

187. Hult, *supra* note 17.

schools act as an administrator of the funds that are put towards individual compensatory education awards, the administrators of these funds are not “neutral.”¹⁸⁸ That is, they might find ways to thwart the awarding these compensatory awards due to limited funding, as well as lack the “expertise and time to effectively administer these funds.”¹⁸⁹ Hult proposes placing these funds in a trust, and allowing a neutral trustee to distribute them without an incentive to delay awards.¹⁹⁰ Without a different funds-distribution system, Hult warns that “schools can circumvent remedies,” and not be “hurt” by lawsuits.¹⁹¹

This is especially important while considering the vague distinctions between recovery services and compensatory education. Following COVID-19 school closures, schools will argue that recovery services were adequate, a FAPE was not denied, and therefore, a student is not entitled to compensatory education. Further, if recovery services become the widespread method of relief across states in broad replacement of compensatory education, those awards would be based on what a school is able to provide, not necessarily on what a student actually needs.¹⁹² While these funding changes can help mitigate some of the damage underlying the existing recovery process, some believe “funding isn’t enough.”¹⁹³

C. Expedite the Process for Granting Compensatory Education Awards

Building on Hult’s foundation, and assuming new funding can be allocated specifically for compensatory education, districts should design an expedited resolution process for circumstances in which many students may bring claims for relief. Apart from court decisions and administrative hearings, hundreds of compensatory education awards “are negotiated by the parties

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Duffort, *supra* note 15.

193. Siddiqi, *supra* note 44 (“We need supportive, equitable policies to improve education for students with disabilities as the school year progresses.”).

outside of the hearing or courtroom.”¹⁹⁴ Often, these resolutions take place during a resolution session or mediation.¹⁹⁵ While staying within the framework of a compensatory education remedy, responsibilities and recovery could be delegated to a specific group to administer informal meetings and expedite the process of granting equitable relief to students. Then, only in rare instances would a parent have to further pursue a separate claim within the existing dispute resolution system, and thus further delay a child’s journey towards regaining lost skills.

Before these informal meetings, parents could submit a “Declaration Form” similar to what has been used during the federal moratorium on evictions.¹⁹⁶ During the pandemic, tenants, lessees, or residents were able to fill out a form to receive protection from eviction.¹⁹⁷ Though this form was designed to mitigate the spread of COVID-19 by keeping residents in their homes, the nature of its widespread reach is similar to what exists within special education. In order to demonstrate a student’s need for a compensatory education award, parents could “declare” statements such as the following:

I have used my best efforts to implement my child’s IEP during remote learning . . .

My child has regressed in subject(s) _____ in the following ways . . .

My child was unable to receive services _____ and _____ during the following time period _____.

When schools reopen, I request that my child receive an award for compensatory education to be put towards _____ and _____ services.

A Declaration Form could expedite the recovery process by allowing parents to articulate the specific, individualized relief

194. Seligmann & Zirkel, *supra* note 16, at 310.

195. *Id.* at 290.

196. See *Declaration Under Penalty of Perjury for the Centers for Disease Control and Prevention’s Temporary Halt in Evictions to Prevent Further Spread of COVID-19*, <https://www.epcounty.com/jp/documents/jp7/CDC-Declaration-Form.pdf> (last visited Feb. 12, 2022) [<https://perma.cc/5478-KHH2>].

197. *Id.*

that their child needs. A designated group within a school district, acting similarly to a hearing officer or judge, would be able to efficiently grant a child compensatory relief. This simplified form would also alleviate some parents' fears that gaining compensatory relief would be nearly impossible due to their lack of precise data and information.¹⁹⁸ A number of education law scholars have long believed that “[a] calibrated, predictable approach to determination of compensatory education awards needs to develop[.]”¹⁹⁹ A Declaration Form could create this predictable, categorical approach, while still preserving the individualized nature of an IEP. Further, it could redirect what could be thousands of individual demands for relief through traditional administrative and judicial avenues.

CONCLUSION

COVID-19 has interfered with special education in a way that many would describe as entirely unprecedented and vastly disruptive. Though the particular aspects of long-term school closures remain unmatched, the problems underlying the approaches to equitable remedies under the IDEA have long existed. Though states have adopted “recovery services” in an attempt to respond to the widespread need for relief, these efforts have confused the value and purpose of the existing remedy under the IDEA. Solutions must focus on repositioning a FAPE-denial, reapportioning fund distribution and recovery, and reevaluating the meaning of a FAPE. This will allow compensatory education to provide what it was created for — restoration for students with disabilities. With a new approach, this remedy can relieve and support students at a time when providing restoration and compensation is most crucial.

198. *Special Education & Covid-19 Outbreak: Frequently Asked Questions*, DISABILITY RIGHTS OHIO, <https://www.disabilityrightsohio.org/special-education-covid-faq> [https://perma.cc/6VQE-MGBR] (last visited Mar. 21, 2022) (advising parents to keep “detailed documentation” for a student to be eligible for compensatory education).

199. Seligmann & Zirkel, *supra* note 16, at 309.