



Compensatory Services and Students with Disabilities

By Allan G. Osborne, Jr., Ed.D., and Charles J. Russo, J.D., Ed.D.

Compensatory services, like reimbursements, make up for the inappropriate education students received while placement issues were in dispute.

Students with disabilities are entitled to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA). If school officials fail to provide students with a FAPE, the courts may grant appropriate relief (20 U.S.C. § 1415[I][2]).

Courts often direct educators to provide students with disabilities with a FAPE and to compensate parents for expenses associated with obtaining the services that their children lost, such as tuition. Courts have also granted awards of compensatory educational services to students whose parents were unable to pay for placements in advance.

Judicial awards of compensatory services have extended students' eligibility for years after they graduated or reached the maximum age of eligibility under the IDEA or state laws, have included extra services during academic terms, and have added services during vacation periods. Moreover, as reflected by a case from Georgia, *Draper v. Atlanta Independent School System* (2008), the Eleventh Circuit affirmed that a school board had to place a student in a private school since officials failed to provide him with a FAPE.

In light of *Draper*, this column reviews compensatory services awards. The first section reviews the types of compensatory services awards that courts have granted, while the second analyzes the Eleventh Circuit's judgment in *Draper*. The final substantive section offers suggestions for school business officials and other education leaders who must plan and budget for such awards. The column rounds out with a brief conclusion.

Compensatory Services

In *Burlington School Committee v. Department of Education, Commonwealth*

of Massachusetts (1985), the Supreme Court interpreted the IDEA as permitting parents to be reimbursed for unilaterally enrolling their children in private schools if education officials failed to provide a FAPE, as long as the placements were found to be appropriate. The Court reasoned that reimbursement essentially required boards to pay costs retroactively that they should have incurred initially, had educators developed appropriate individualized education programs (IEPs) for the students. If reimbursements were unavailable, the Court explained, the students' rights to a FAPE would otherwise have been compromised.

Following *Burlington*, Congress amended the IDEA by including provisions that allowed for reimbursement awards as long as parents met certain conditions, such as giving school boards prior notice of their dissatisfaction with proposed IEPs (20 U.S.C. § 1412[a][10][C]). Lower courts have applied *Burlington* in upholding awards of compensatory educational services.

If school boards fail to provide a FAPE and parents lack the financial means to obtain alternate services, or for whatever reason have not procured them privately, children can remain in inappropriate programs for extended periods while administrative hearings are pending. As a result, since students can be denied a FAPE during the appeals process, judicial awards often provide the only viable remedy. The purpose of compensatory services, which are usually provided when students would otherwise have been ineligible for services, is to make up for what they lost and put them in the positions they would have been in had officials provided appropriate IEPs at the outset.

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cation students received while placement issues were in dispute. The theory behind awarding compensatory services is that appropriate remedies should not be limited to parents who can afford to provide their children with alternate educational placements while litigation is pending (*Lester H. v. Gilhool* 1990; *Todd D. v. Andrews* 1991; *Manchester School District v. Christopher B.* 1992). Although compensatory services must be generally equivalent to the services students were denied (*Valerie J. v. Derry Cooperative School District* 1991), parties can recover awards even after students pass the maximum age for eligibility under the IDEA (*Pihl v. Massachusetts Department of Education* 1993; *State of West Virginia ex rel. Justice v. Board of Education of the County of Monongalia* 2000).

An early case from the Eleventh Circuit treated tuition reimbursement and compensatory services awards as being similar. The court affirmed that such awards were analogous because both were necessary to preserve students' rights to a FAPE (*Jefferson County Board of Education v. Breen* 1988). The court maintained that absent compensatory services awards, student rights under the IDEA would have depended on the ability of the parents to obtain services privately while due process hearings progressed.

Earlier, the Eighth Circuit upheld an award of compensatory services to a father who could not afford to pay for services during the lengthy court battle (*Miener v. Missouri* 1986). In granting the award, the court added that Congress did not intend for the rights of students to depend on parental ability to pay for the costs of placements. Later, an Ohio court commented that if compensatory services were unavailable, the parents would have won a Pyrrhic victory because the child's right to a FAPE would have been illusory (*Cremeans v. Fairland Local School District Board of Education* 1993).

Even though receipt of a high school diploma generally signals the end of students' eligibility for special education, individuals may receive compensatory services after they graduate. For example, the federal trial court in Massachusetts awarded compensatory services to a student who earned a high school diploma, determining that she was denied a FAPE (*Puffer v. Reynolds* 1988). The court noted that the student's having earned a diploma was evidence that she succeeded despite the shortcomings in the education she received rather than that she had no need for services. The court thus ordered officials to provide the student with services equal to those she should have received before her graduation.

Draper v. Atlanta Independent School System

Draper v. Atlanta Independent School System (2008) began when a student in Georgia who had difficulty reading and writing entered the system in second grade. Even though his teachers recommended that he be tested, officials did not do so until the student was ready to enter the fifth grade.

After being evaluated, the student was placed in a self-contained special-education class for children with mild intellectual disabilities and was not reevaluated until he was in high school, almost five years later, even though the IDEA calls for annual and triannual reevaluations (20 U.S.C. §§ 1414[a][2][B][iii], 1414[d][4]). The reevaluation revealed that the student had learning disabilities rather than mild, intellectual disabilities. Officials then proposed an IEP calling for the student to be placed in a general education setting with an instructional computer program. However, the instructional computer program was not implemented in a timely manner, another violation of the IDEA.

Dissatisfied with their son's placement, his parents requested a hearing at which an administrative law judge

observed that school officials failed to provide him with a FAPE since he was misdiagnosed and not reevaluated in timely fashion. The administrative law judge awarded the parents reimbursement for the costs of a reading program that they provided privately along with compensatory services. Rejecting the offer of compensatory education, the parents chose a private school option.

The school board unsuccessfully challenged the administrative law judge's order in a federal trial court in Georgia (*Draper v. Atlanta Independent School System* 2007). The court held that the student was entitled to an award to compensate him for the board's denial of a FAPE. Deciding that the award had to offer the student the services he should have received at the outset, it agreed that the private school program was an appropriate option. Further, the court recognized that the student was entitled to attend the private school until the year 2011, or until he received a high school diploma, whichever came first.

On further review in *Draper* (2008), the Eleventh Circuit affirmed that because officials failed to provide the student with a FAPE, the private school was an appropriate setting. According to the court, if the judiciary were unable to make the prospective award, the student would have been worse off than he would have been with a retroactive award of reimbursement. The court pointed out that the IDEA does not require families that lack resources to place their children unilaterally in private schools to first prove that the public schools were unable to educate their children adequately before making such placements. Although the court acknowledged that the provisions of the IDEA preferred having special-education students placed in public schools, it wrote that the law does not foreclose compensatory awards in private schools.

The Eleventh Circuit ruled that compensatory damages awards differ from the educational programs ordinarily required by the IDEA. Put another way, the court thought that while an IEP need only provide some educational benefit, compensatory awards must do more: they should place students in the positions they would have been in but for the violations of their IDEA rights. In conclusion, the court upheld the private school placement as reasonably calculated to provide the educational benefits that the student would likely have had if officials initially offered him an appropriate IEP.

Discussion

When school boards fail to provide students with a FAPE, they must compensate them for not doing so. When parents unilaterally provide their children with special-education and related services privately, the solution is fairly straightforward: boards must reimburse them for their expenses. However, if parents cannot, or do not, obtain private services when officials fail to comply with the IDEA, parents, acting on behalf of their children, are entitled to awards of compensatory services.

Fashioning awards of compensatory services can be difficult. Providing the exact services in the future that should have been supplied in the past is not always feasible or even appropriate. By the time courts grant awards, student needs may have changed. In other words, several years down the road, it may take more to make students whole than it would have if the services had been provided from the outset since they may have fallen further behind. Consequently, courts try to mold awards to put students in the positions they would have been in had they received a FAPE initially.

Compensatory services awards for younger students may give them additional services in excess of what they would have received to make up for past deprivations. For example, if a

student misses two years of occupational therapy, a court may order a school board to “double up” on the child’s therapy for the next two years. Other students may be given extended school year services so that their losses are made up during summer months and vacations. Older students may have their eligibility for special education extended beyond the normal limit to receive IDEA services. Even so, providing compensatory services may not be as expensive as might be feared since they can be provided by existing staff at minimal cost because those providing the services are already employed by the boards.

Draper highlights the fact that courts can order boards to pay for placements in private schools if they are necessary to remedy past deprivations. In *Draper*, the court treated the board’s failure to provide a FAPE as particularly egregious since educators failed to evaluate the student when he first exhibited difficulty, misdiagnosed him, offered incorrect services, and compounded the error by not reevaluating him pursuant to the IDEA’s mandates with the result that he was denied a FAPE for most of his school years. Thus, the courts agreed that the only way to remedy the situation was to provide the student with an intensive program that extended beyond his usual years of eligibility.

Conclusion

Awards of compensatory educational services, like those for tuition reimbursement, can catch school boards off guard since they are generally neither anticipated nor included in budgets.

Not surprisingly, since compensatory services awards can deplete special-education budgets, the most cost-effective means of providing special-education and related services is to make them available up front. To this end, school business officials and other education leaders need to work with both special-education administrators and school boards to ensure

that the annual allocations for special-education services are adequate to meet the needs of all their students. Making sure that funds are available to meet those needs from the beginning may avert costly budget-breaking awards in the future.

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Allan G. Osborne, Jr., Ed.D., is an adjunct professor of school law at American International College in Springfield, Massachusetts. Email: allan_osborne@verizon.net

Charles J. Russo, J.D., Ed.D., Panzer Chair in Education in the School of Education and Allied Professions and adjunct professor of law at the University of Dayton in Dayton, Ohio, is chair of the ASBO Editorial Advisory Committee and vice chair of ASBO’s Legal Aspects Committee. Email: Charles_j_russo@hotmail.com